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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and
MARIAN S. HAYWARD,

Appellants,

vs.

G. de BRETTEVILLE, TREASURE COMPANY, WALTER B. SCOVILLE and THE ADAMANT COMPANY,

Appellees.

G. de BRETTEVILLE and TREASURE COMPANY,

Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

Opening Brief of Appellants Herschel Bullen, Mary
H. Bullen, J. C. Hayward and Marian S. Hayward.

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Mary H. Bullen, J. C. Hayward and
Marian S. Hayward.*

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No. 14897.

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HERSCHEL BULLEN, MARY H. BULLEN, J. C. HAYWARD and
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Appellants,

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Appellants,

vs.

WALTER B. SCOVILLE and THE ADAMANT COMPANY, a corporation,

Appellees.

Opening Brief of Appellants Herschel Bullen, Mary H. Bullen, J. C. Hayward and Marian S. Hayward.

Statement of the Case.

This case involves the question of whether or not an agreement to pay a sum of money "out of" production from an oil well creates a lien upon or other security interest in that portion of production owned by the persons who made the agreement. There is also a question as to whether or not that issue is *res judicata*, and a further question of whether one of the parties against whom relief is sought is bound by the agreement.

The appeal is from a judgment dismissing a complaint in intervention, whereby the appellants sought payment of the amount due under the agreement out of a fund held by the Court, representing the value of production owned by the parties to the agreement. This fund arose from the condemnation of the property by the Federal Government.

A brief history of the events out of which the controversy arises is as follows:

Treasure Company was the lessee under an oil and gas lease of certain property in the City of Los Angeles. It commenced drilling a well and ran out of money. An agreement was entered into by Treasure Company with the appellees in this appeal, the plaintiffs below, Walter B. Scoville and The Adamant Company, wherein Scoville and The Adamant Company agreed to provide certain funds to continue drilling, in consideration of which each was to receive participating royalties entitling them to payment of a certain percentage of the proceeds of sale of oil and gas produced from the property, after the payment of expenses.

This agreement provided for an executive committee to conduct operations on behalf of the parties to the agreement. This committee, at the time with which we are concerned, consisted of G. de Bretteville, President of Treasure Company, Harry Wynn, an employee of Treasure Company, and J. Orville Seepie, who was representing Scoville and The Adamant Company, and who had actual charge of drilling.

Scoville and The Adamant Company paid the agreed amount, and drilling was resumed, but the funds proved

insufficient, and additional financing was required. Scoville undertook, on behalf of himself and The Adamant Company, to raise additional funds. He approached the appellants, and suggested that they provide some money for completing the well. He represented to the appellants that his group was in control of the property, through the executive committee, and that they owned a majority of the production. [Tr. 131, 144.]

The appellants invested a total of \$5,000.00, being \$2,500.00 for Mr. Bullen and \$2,500.00 for Dr. Hayward. The terms of the investment are set forth in a letter dated September 27, 1938, written by one of the appellants, Herschel Bullen, to George Halverson, an attorney, who was at that time representing Scoville and The Adamant Company in a dispute with de Bretteville and Treasure Company. Scoville and The Adamant Company signed an endorsement on this letter agreeing to its terms, which were that the appellants, in addition to receiving assignments of two 1% participating royalties, were to receive \$5,000.00 each, or an aggregate of \$10,000.00, "out of the first 15% of production from the said well." A copy of this letter agreement of September 27, 1938, the so-called "two for one agreement," is Exhibit A of the complaint in intervention, and is set forth at pages 78 to 81 of the printed transcript. It is also Exhibit B-1 of plaintiffs in intervention.

These terms were not the result of bargaining between Scoville and the appellants. He made the same proposal to them as he made to other investors, that is to say, that they would be repaid their money out of 15% of production, and that he would, in addition, assign to them from his holdings a 1% participating royalty for each \$2,500.00

invested. In fact, the appellants were concerned about whether the transaction could be considered usurious, and were advised that it was not, because the payment was contingent upon the well being successful, and there was no obligation of anyone to pay the money within a certain time, or in any event. It was payable only out of production from a well, which was not then producing and might not produce.

The appellants paid over \$2,500.00 each, or a total of \$5,000.00, and this money, together with other funds, and credits which were obtained from supply houses, enabled operations to start again, and the well was completed and placed on production in December of 1938. This was done under the management of the executive committee, although shortly thereafter Treasure Company took possession.

Treasure Company continued to operate the well. The gross production of oil and gas therefrom amounted to over \$200,000.00. No part of the gross production was applied to payment of the \$10,000.00 which was to be paid out of 15% of such gross production to the appellants under their agreement, and they have received no payment from any other source. It should be said, perhaps, in this connection that appellants at one time sold their rights under the two for one agreement and their royalties, the sale being made under a conditional sales contract, and they received some money under the contract, but the buyer thereafter defaulted, and all rights were restored to the appellants. [Tr. 148-149.] No payments on account of the obligation to pay \$10,000.00, as set forth in the letter agreement, were ever made by anyone, and the Court so found. [Finding XII, Tr. 106.]

The appellants have also received no payments on their 2% participating royalties, which were assigned to them by Scoville, nor have Scoville and The Adamant Company received any payments on their royalties. de Bretteville, President of Treasure Company, has maintained, successfully, that the expenses of operation, including large legal fees in his litigation with Scoville and The Adamant Company, have used up all the money which would otherwise have been payable to them and their assigns. As to the two for one agreement, he contended that he knew nothing about it, and both Judge Westover in the condemnation case, and Judge Yankwich in the case at bar, found that Treasure Company was not bound by it. [Finding XI, Tr. 106.] That finding is not questioned by the appellants.

On September 10, 1941, Scoville and The Adamant Company brought a suit in the Federal Court, being the case at bar, seeking an accounting for any sums due upon their royalty interests from past production, and for repayment of the sum of \$13,000.00, included in which was the \$5,000.00 put up by these appellants, which Scoville and The Adamant Company had advanced for the completion of the well, and which they claimed was done under an agreement by Treasure Company to repay it two for one out of 15% of gross production.

In the meantime, and on September 28, 1942, the Government of the United States instituted a condemnation proceeding for the use of Reconstruction Finance Corporation, to condemn certain real property, included in which was the property covered by the oil and gas lease held by Treasure Company, upon which Treasure Well No. 8 was

invested. In fact, the appellants were concerned about whether the transaction could be considered usurious, and were advised that it was not, because the payment was contingent upon the well being successful, and there was no obligation of anyone to pay the money within a certain time, or in any event. It was payable only out of production from a well, which was not then producing and might not produce.

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drilled. Scoville and The Adamant Company, and the appellants Bullen and Hayward, were made parties defendant in that action, and an award was made for the value, at the date of condemnation, of future production from the well, owned by the lessee and the participating royalty holders.

The parties petitioned for the distribution of their respective shares of this award, and the appellants asserted a lien or a security interest in the nature of a trust deed upon the interest of the lessee, Treasure Company, and upon the royalty interests of Scoville and The Adamant Company, under the letter agreement of September 27, 1938, and requested payment of the \$10,000.00 out of the award.

The trial court in that case found that the agreement with appellants was made by Walter B. Scoville, and that neither Treasure Company nor The Adamant Company was a party to or was bound by it, and the Court also adopted a conclusion of law as follows:

“The enforcement of the so-called ‘two for one agreement’ between the Bullens and Haywards and Walter B. Scoville is a personal matter, and is not a matter for settlement in the within case.”

All parties appealed from the judgment in that case. *United States v. Adamant Company, et al.*, 197 F. 2d 1. The holding of the trial court that the lessee was not bound by the two for one agreement was affirmed, and this Court also held that the rights of the lessee were properly subject to adjudication and to payment in the condemnation case, and ordered payment to Reconstruction Finance

Corporation, as assignee of the lessee, of the value of the lessee's interest, \$97,767.00.

In its discussion of the two for one agreement, the Court indicated its concurrence in the view of the trial court that the rights created thereunder were personal, but the Court did not mention the question of whether or not it could be specifically enforced against the interests of any royalty holder who was a party to it in an action against such royalty holder.

As to the royalty holders, the Court held that they were analogous to stockholders in a corporation, and that their rights would have to be determined in accounting suits which had already been instituted by royalty holders against the lessee, the case at bar being one of them. The portion of the award attributable to the percentages of production held by the royalty holders was ordered to be held by the Court pending the outcome of the accounting suits, and it is now held in the registry of the Court. The amounts so held with which we are concerned are as follows:

Adamant Company	\$47,925.00
Walter B. Scoville	30,672.00
H. Bullen and Mary H. Bullen	1,917.00
J. C. Hayward and Marian S. Hayward	1,917.00

Following that decision, the appellants asked leave to intervene in the accounting action, seeking, among other things, the payment of the \$10,000.00 owed to them out of the money, listed above, which now stands in lieu of the royalty interests of the parties to the agreement. The District Court, by Judge Peirson M. Hall, granted the motion for leave to intervene.

The question of the nature of the two for one agreement, whether it was personal only, or whether it created a lien against the share of production owned by the parties to it, and also whether or not the comments upon the nature of the two for one agreement made by this Court in the condemnation case, were controlling in this action, were briefed and argued before Judge Hall. In a memorandum opinion [Tr. 63], Judge Hall ruled that under the agreement the appellants had a remedy to reach the *res*, *i.e.*, the money standing in lieu of Scoville's royalty interest, that the *res* did not come into being until final judgment in the condemnation action, that enforcement of the agreement was consequently not barred by the statute of limitations, and, also, that the statements by this Court in the condemnation case were not the law of the case, and did not preclude the intervention of the appellants in this case.

A complaint in intervention was thereupon filed by these appellants. In one cause of action they joined with the plaintiffs, Walter B. Scoville and The Adamant Company, in the request for an accounting by the defendant, Treasure Company, of any net amounts from past production which might be due upon their participating royalties, a 1% participating royalty, as noted above, being held by each of the appellants. The trial court found that no money was due from past production, and there is no appeal on that point, either by the plaintiffs Scoville and The Adamant Company, or by these appellants, the plaintiffs in intervention.

In a second cause of action, the appellants asked the Court to determine that they are entitled to have paid to

them the shares of the award in the condemnation action representing the value of their participating royalties, to wit, \$1,917.00 to Herschel Bullen and Mary H. Bullen, and \$1,917.00 to J. C. Hayward and Marian S. Hayward. The judgment authorized payment of these amounts, and there is no appeal by anyone from that part of the judgment.

By their third cause of action, the appellants asserted against the plaintiffs, Scoville and The Adamant Company, defendants in intervention and appellees here, the right to subject their shares of the money award, which stand in lieu of the royalty interests of said appellees, to payment of the amount due under the two for one agreement. The case was tried by Judge Leon R. Yankwich, who had written the opinion in the condemnation appeal, *United States v. Adamant Company*, 197 F. 2d 1, and he held in this case that the two for one agreement created only a personal obligation, that it was not specifically enforceable against royalty interests of the parties to it, and that the action was, therefore, barred by the four-year statute of limitations. The judgment authorized the distribution to Walter B. Scoville of his share of the award, \$30,672.00, and to The Adamant Company of its share, \$47,925.00, without deduction by any lien or charge in favor of appellants. It is not clear from the findings whether or not Judge Yankwich intended to follow Judge Westover's finding in the condemnation case that The Adamant Company was not a party to the agreement. This appeal is from that part of the judgment which denied enforcement of the two for one agreement as a lien or charge in the nature of a trust deed on the portions of the award belonging to Scoville and The Adamant Company.

Questions Involved.

(1) UNDER THE AGREEMENT FOR THE PAYMENT OF \$10,000.00 OUT OF PRODUCTION FROM THE WELL, DID THE INTEREST IN PRODUCTION OWNED BY THE PARTIES TO THE AGREEMENT STAND AS SECURITY FOR PAYMENT OF THE \$10,000.00?

(2) DID THE STATEMENTS BY THIS COURT IN THE CONDEMNATION CASE THAT THE AGREEMENT WAS A PERSONAL ONE CONSTITUTE A HOLDING ON THE QUESTION OF THE RIGHT TO ENFORCE IT AGAINST THE ROYALTY INTERESTS OF THE OBLIGORS THEREUNDER; AND, IF SO, IS THE POINT RES JUDICATA OR THE LAW OF THE CASE?

(3) IS THE COMPLAINT IN INTERVENTION SEEKING TO ENFORCE THE TWO FOR ONE AGREEMENT AGAINST THE INTEREST IN PRODUCTION OWNED BY SCOVILLE AND THE ADAMANT COMPANY BARRED BY THE STATUTE OF LIMITATIONS?

(4) DID THE ADAMANT COMPANY SIGN THE TWO FOR ONE AGREEMENT BY AN AUTHORIZED OFFICER, AND IS THE FINDING, IF THERE IS SUCH A FINDING, BY THE COURT BELOW, TO THE EFFECT THAT IT DID NOT, ERRONEOUS?

(5) IS THE PURPORTED FINDING BY THE COURT IN THE CONDEMNATION CASE THAT THE ADAMANT COMPANY WAS NOT BOUND BY THE TWO FOR ONE AGREEMENT RES JUDICATA?

ARGUMENT.

I.

The Agreement Under Which the Appellants Were to Receive \$10,000.00 Out of the Gross Production From Treasure Well No. 8 Is Enforceable Against That Part of Production Owned by the Persons Who Were Parties to the Agreement.

The basic question is whether the agreement for payment of \$10,000.00 was merely a personal undertaking to pay a sum of money giving rise only to an action in debt, or for damages, against the obligor, if not paid, or whether it was secured by the interest of the obligors in the oil well, so that an action will lie in equity to apply the security to payment of the obligation. It would seem that this is simply a question of the legal effect of the language used in the agreement.

The language is quite simple. The agreement is in the form of a letter from Herschel Bullen to George Halverson, a Los Angeles attorney, who was also representing Scoville and The Adamant Company. [Tr. 171, 174.] The letter enclosed an application to the Commissioner of Corporations for consent to transfer the two 1% participating royalties, which the appellants also received in the transaction, and two \$2,500.00 cashier's checks. It authorized the use of the checks when certain conditions were complied with, and stated:

“These funds, \$5,000.00, to be included in the said necessary funds, to be repaid two for one out of production—to fully comply with paragraph II of page 2 of said application herewith enclosed, it being understood and agreed that the said two for one out of production is to be repaid out of the first 15% of gross production from the said well.”

The letter bears an endorsement reading:

“We agree to the foregoing.”,

which was signed by Walter B. Scoville and by The Adamant Company, by Helen Scoville, Secretary. [Tr. 81.] The endorsement was also signed by The Walter B. Scoville Company, this being for the reason that the agreement provided that in the event the well was a failure, the appellants were to receive comparable interests in certain properties in Wyoming. These properties were owned by The Walter B. Scoville Company. [Tr. 183.]

The agreement thus, in explicit terms, shows that the parties were interested in property rather than personal obligations. There was no agreement by anyone to pay the money in any event. It was to come from the well in question if it was a producer, otherwise from the Wyoming property. The agreement contains no language to the effect that payment was to be merely measured by or equal to a percentage of production from the well, or that the reference to a percentage of production was only intended to fix the time when the money would be paid. Payment was to come “out of” such production.

The effect of such an agreement was decided in early times. For example, in *Legard v. Hodges*, 1 Ves. Jun. 477, 29 English Reports Chancery, 684 (1792), the defendant, Anthony Hodges, at the time of his marriage, made a covenant that he would pay into the hands of the plaintiffs, as trustees, the sum of 10,000 pounds, and that “he would, after three years from the solemnization of the marriage, set apart an appropriate amount as a fund toward raising said 10,000 pounds, one-third part of the yearly rents arising from his several estates in Berks

and Oxford . . .” (Italics added.) The money was not paid, and plaintiffs filed a bill in equity charging that the produce of the estate ought to be accounted to them, and one-third part thereof applied for the purpose of raising the 10,000 pounds, and praying an account of rents and profits received from the estates.

Mr. Mansfield and others for the defendants argued (p. 686 of 29 English Reports) that “the covenant is merely a personal covenant by Hodges to appropriate the third part of the produce to the payment of the 10,000 pounds. An action would lie for the breach of it, and in such action damages to the amount of the third part might be recovered. But the estate itself is not bound by the covenant; there is no lien upon the estate itself.” The Court held for the plaintiffs, and the Lord Chancellor, after distinguishing a case cited by the defendants, said at page 687:

“I take the doctrine to be true, that where the parties come to an agreement as to the produce of the land, that the land itself will be affected by the agreement.”

This result has been uniformly reached by the Supreme Court of California in determining the effects of assignments and agreements relating to shares in oil production, though not without contrary holdings in the lower courts. In one of the earlier cases, *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 24 P. 2d 971 (1933), Miller, the lessee under an oil lease, rented some drill pipe from one of the appellants. As part consideration he assigned to the appellant outright 2% of all oil and gas to be produced. In addition, he agreed to pay a cash rental, and he assigned to appellant 10% of

the oil and gas produced, as security for payment of the rental. Thereafter the lessee transferred his lease to the defendant Venago Oil Corporation, which had notice of the assignments, but refused to honor them. The question arose in an interpleader action wherein the plaintiff, Western Oil & Refining Co., which held a cash fund resulting from the sale of oil and gas from the property, interpleaded the defendant Venago Oil Corporation, which had produced the oil, and the appellants, who claimed their percentages of the production under the assignments from Miller. It will be noted that while the documents in this case were in the form of assignments of certain percentages of oil and gas to be produced, they assigned oil "to be produced, saved, and sold," so that they necessarily operated only as an agreement by the lessee to pay over a certain percentage of the proceeds of the sale of such oil and gas. The royalty holders had no rights of possession, and could look only to the lessee, their assignor, to produce the oil, and give them their respective percentages. Because of this, the trial court, Hon. Leon R. Yankwich, then a Judge of the Superior Court of California, interpreted the documents as being, in effect, only personal covenants of the lessee, and held that the appellants had no interest in the specific cash proceeds derived from the sale of the oil. This judgment was reversed by the Supreme Court. The Court, at page 737 of the California report, and page 973 of the Pacific report, said:

"We cannot accede to the trial court's view that the instruments were merely personal undertakings of Miller to pay appellants percentages of the proceeds of oil produced by him individually."

A difficulty which the California courts have had in treating a purported assignment of a percentage of oil to be produced as giving a property interest, is that in California the "oil in place" doctrine is not followed, and it is considered that even the landowner does not have title to the fugitive substance while it is underground. This difficulty was met in the *Venago* case by a reference to the "potential possession" theory of personal property to be produced from land as giving a present transferable interest in the property to be produced in the future.

In *Callahan v. Martin*, 3 Cal. 2d 110, 43 P. 2d 788, the Court stated that the potential possession theory had been abolished by the adoption of The Uniform Sales Act in California, but nevertheless held that an assignment of a percentage of oil to be produced created a property interest. This was on the theory that it was a *profit a prendre*. Later, in *Schiffman v. Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081 (1937), where the instruments gave a share of the *net proceeds of sale* of oil and gas, and were made by the lessee of an oil lease, the Court reached the same result as in *Venago* and *Callahan*, although the theory in this case was simply that the royalty holder should be considered in equity as the owner of a property interest, because he should be entitled to specific performance. The Court said at page 228 of the report in 8 Cal. 2d:

"The equitable doctrine of specific performance and equitable conversion as applied to contracts to buy and sell land, arose from the inadequacy of the remedy of damages due to the unique character of the subject matter of the contract. In the case of royalty assignments the uncertainty in amount and

value of the oil to be produced renders the subject of the contract unique.”

As late as 1941, the Court was still uncertain as to theory, but unshaken in its view that instruments purporting to transfer oil to be produced, or the proceeds thereof, gross or net, in whatever form and whether created by landowner or lessee, and whether or not the holder had a right to enter and take the oil himself, gave a property interest. Finally, in *La Laguna Ranch Co. v. Dodge*, 18 Cal. 2d 132, 114 P. 2d 351 (1941), the Court, after discussing royalties of various types, and after advertng to the fact that ordinarily a royalty holder, unlike a lessee, has no right of possession and hence cannot be said to have a *profit a prendre*, held that he has an analogous right, saying at page 139 of the report in 18 Cal. 2d:

“ . . . the interests thus created have been considered *sui generis*,”

and, on the same page,

“ . . . the purpose and scope of all such royalty interests are so similar that all should be considered equally to be incorporeal interests in real property . . . ”

The same result has been reached where the assignment is of an interest of limited duration and made to secure the payment of a fixed sum of money. As noted above, one of the assignments in the *Venago* case was of this nature, and in a later case, *Recovery Oil Co. v. Van Acker*, which was before the District Court of Appeal on two occasions, reported in 79 Cal. App. 2d 639, 180 P. 2d 436, and 96 Cal. App. 2d 909, 216 P. 2d 483 (hear.

den. by S. Ct. June 8, 1950), the only assignment involved in the case was for security. In this case, certain people held a prospecting permit authorizing them to explore for oil on land owned by the United States. They executed a document reading in part as follows:

“The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen per cent (15%) of the oil, gas and other hydrocarbon substances produced, saved and sold from the said premises so covered by said Operating Agreement (less amount used in operations on the premises), until such time as said assignee shall have received the sum of Twenty Thousand Dollars (\$20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end.” (79 Cal. App. 2d at 640.)

Thereafter the holder of this assignment transferred a half interest in it, and in the obligation secured thereby, to one of the defendants. The interest of the original permit holders was acquired by the plaintiff corporation, which brought a quiet title suit seeking, among other things to quiet its title against the rights of the holder of said assignment. The argument of the plaintiffs as to the effect of the assignment is set out at page 642 of 79 Cal. App. 2d, and page 438 of 180 P. 2d:

“Plaintiff points out that the instrument before us assigned a portion of the *proceeds* from the oil, gas and other substances produced from the leased property, while that involved in the Callahan case assigned an interest in the oil and gas produced. From this they argue that the assignment can be construed to be no more than a promise on the part of the assignor to pay the assignee a sum of money out of a specific fund and that at most it could only be

construed as creating a lien on the oil produced, which lien has long since been barred by the statute of limitations.”

The Court did not deny that the only practical effect of the assignment could be an agreement by the operator to pay over a sum of money, but nevertheless held that its legal effect, under the California cases, was the assignment of a property interest to secure the indebtedness. The Court further held, apparently in reliance upon the cases holding that instruments purporting to sell oil to be produced in the future give a present *legal* interest, that the holder of the assignment given for security had a *legal estate* in the nature of a trust deed. It was also held that the fact that past production had been sufficient to pay the debt was immaterial, if it had not been so applied. The Court said at page 485 of the report in 216 P. 2d:

“The assignments by which the respondent acquired her interest assigned to her a certain share in the production from the land until such time as she received \$10,000.00. Her interest was to terminate when she received this amount, otherwise it would run for the full term of the lease. No date was fixed for the termination of her interest, and it was conditioned upon her receiving the money, and not upon the production of an amount sufficient to pay the money. Any obligation to pay was not only a continuing one but she had an interest in the land which did not terminate until she actually received that amount of money. Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed.”

This case, we submit, is decisive of the case at bar, if California law is to be followed.

It is true that in the *Van Acker* case the instrument purported to be a present assignment, although it could obviously have only the practical effect of an agreement, whereas in the case at bar the instrument is in form an agreement. This is a distinction without a difference. Where the agreement is such that the later formal document would add nothing to it, it is to be treated as if it were a formal transfer, and if it relates to an interest in oil to be produced, under California law it gives a present legal interest. In *Gavina v. Smith*, 25 Cal. 2d 501, 154 P. 2d 681, the plaintiffs executed an agreement with the defendant wherein the defendant, in consideration of the payment of \$100.00 to the plaintiff, was given an option to acquire an oil and gas lease on certain property, the lease to be in a form attached to the agreement. Defendant exercised the option, but the plaintiff refused to sign the lease. This was an action by the plaintiffs to quiet title to the property against the defendant's rights under the contract. There was a judgment for the plaintiffs, which was reversed by the Supreme Court of California. The plaintiffs' theory is shown by the following statement in the opinion at page 682 of the Pacific report:

"Plaintiffs contend that upon the exercise of the option defendant had merely an executory contract to make a lease; that although an executed lease would be a good defense to a quiet title suit, an executory contract that is not specifically enforceable is no defense to such a suit; and that the present contract is not specifically enforceable on the ground of lack of mutuality of remedy."

But the Court said, at pages 682-683:

"Where the parties, however, have agreed in writing upon the essential terms of the lease, there is a

binding lease, even though a formal instrument is to be prepared and signed later.”

The Court further held that an agreement to lease, being the equivalent of a lease, created a legal interest in the oil rights, just as a lease would, saying at page 683:

“It is settled in this state that an oil lease like the one in the present case creates a *profit a prendre* and vests in the lessee an estate in real property . . . It is immaterial whether the defendant could get a decree for specific performance if he sought it, for he has a legal interest in the property and legal remedies to enforce it independently of the remedy of specific performance. (Citations.)”

The rule announced in *Gavina v. Smith*, coupled with the decision of the Court in the *Van Acker* case, would seem to require the holding, under California law, that the agreement in our case gave a vested legal estate by way of security to the appellants covering such property rights in the well as were owned by the parties who executed the agreement. If, however, the document is treated as merely an agreement, which did not pass a present title, it would, nevertheless, create rights in the property which would be enforceable in a court of equity, and this result could not be avoided merely by designating the agreement as a personal covenant.

In *Dougherty v. California Kettleman Oil Royalties*, 9 Cal. 2d 58, 69 P. 2d 155 (1937), the plaintiff, Dougherty, made an agreement with one Ochsner, under which Ochsner was to apply to the Federal Government for a lease of oil land, and Dougherty, in consideration of his services in advising Ochsner, was to receive 10% of the oil and gas produced. A written contract was submitted,

which Ochsner agreed to, but never signed. Ochsner obtained the lease, and through various assignments thereof it came to the defendant corporation, California Kettleman Oil Royalties, and later by mesne assignments to General Petroleum Corporation. General Petroleum Corporation acquired the property without any knowledge of the agreement with Dougherty. However, the defendant corporation, California Kettleman Oil Royalties, did have knowledge when it acquired the property, and, in its assignment to General Petroleum Corporation, it reserved a royalty interest, though less than 10%. Dougherty's agreement with Ochsner was held to be enforceable against the defendant corporation to the full extent of its royalty interest. It was held that the agreement, having been fully performed on the plaintiff's part, was not subject to the statute of frauds, and that even though it was a mere personal covenant, it was enforceable against Ochsner and his assigns with knowledge. Here, again, the Court treats an assignment and an agreement as being the same. At one point in the opinion it speaks of an interest which Ochsner had "assigned" to Dougherty. It is clear, however, that the Court realized that the matter rested merely in an agreement. The Court said at page 167 of the report in 69 P. 2d:

"The contract was that Ochsner should hold the title to the permit, deal with it, and should pay Dougherty his agreed share. Dougherty had no cause of action until Ochsner repudiated this agreement."

Again, at page 169 of the Pacific Report, the Court said:

"All of the pleadings allege an oral agreement the consideration for which was certain services rendered by Dougherty."

On the question of the agreement being a personal covenant, the Court said at page 167 of the Pacific report:

“Even if the covenant on the part of Ochsner were a mere personal covenant it would be enforceable in equity against those who took with notice. (Citations.)”

This case clearly shows that under the law of California, as well as under the law generally, the case cannot be disposed of merely by finding that the agreement was a personal covenant by the parties who signed it.

The *Kettleman* case dealt with a continuing interest, an agreement to sell, but the case is even stronger where the agreement is made as security. The application of this principle to a similar situation is exemplified by the case of *Phillips Petroleum Co. v. Gable*, 128 F. 2d 943. This case appears to be on all fours with the case at bar. In the cited case Dixie, the operator of an oil well, bought some casing from plaintiff, and agreed to pay a certain sum for it “*out of* the first proceeds of one-half of Dixie’s present interest in the production from said well.” (Italics added.) The question involved was the rights of the holder of this agreement as against other creditors of Dixie. The Court held that the holder of the agreement had an equitable lien, and would prevail over the other creditors, saying at page 944:

“The contract gave Phillips an equitable lien upon one-half of Dixie’s 30 per cent interest in the first proceeds from production from the well. (Citing cases.) The recording of the contract gave Morris constructive notice of the equitable lien, and required it to make reasonable inquiry. Had it done so, it would have discovered the Phillips lien and learned the debt secured thereby had not been fully paid.”

The *Phillips* case was distinguished in the discussion of equitable liens in *United States v. Adamant Co.*, on the ground that it was based upon an Oklahoma statute. This statute is set forth in the opinion in 197 F. 2d at page 9. The Court considered it to be a statutory enactment of the doctrine of potential possession. The Court then refers to the California cases which relied on a similar doctrine, including the *Venago* case, and says at 197 F. 2d 10:

“But these cases arose prior to the adoption of the present Section 1725 of the California Civil Code in 1931. And, the Supreme Court of California has stated that the effect of the adoption of this Section is to abolish the doctrine of potential possession in California. *Callahan v. Martin*, 1935, 3 Cal. 2d 110, 128, 43 P. 2d 788, 101 A. L. R. 871.”

The Court, in this statement, overlooked the point that Section 1725 of the Civil Code relates only to sales, and that there is a California Code section still in effect relating to liens, which is precisely the same as the Oklahoma statute to which the Court referred as supporting the *Phillips* case. In justice to the Court, it should be said that this section was not called to its attention. It is Section 2883 of the Civil Code, and reads as follows:

“An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest.”

Thus it would appear that the security interest involved here can be analyzed under California law either as a legal

transfer of the royalty interests of the obligors in the nature of a trust deed, or as a lien upon such royalties. Such estate or lien, as the case may be, continues until the money which it secures has been paid, regardless of whether or not there has been production in the past which would have been sufficient to pay the debt, if it had been applied to it. This point is clearly made both in the *Van Acker* case and in the *Phillips* case.

It also appears, however, that if any specific proceeds of production can be identified, they will be applied to satisfaction of the obligation, as was held in the *Venago* case, which involved money held by a purchaser of the oil, who interpleaded the conflicting claimants to it. In the case at bar, we have money held by a stakeholder which was derived from a forced sale of the royalty interests, and whether it be regarded as merely a substitute for the royalty, or as proceeds of production, the "trust deed" or "lien", as the case may be, equally applies to it.

It is also submitted that under the decisions where money is to be paid with funds "arising from" the production of land, as in *Legard v. Hodges*, or is to be paid "out of" such production, as in *Phillips Petroleum v. Gable*, the document, as a matter of law, is to be interpreted as giving a security interest in the land and the production therefrom. It is submitted, further, that the circumstances under which the document was executed, including the representations made by Walter B. Scoville, and subsequent letters written by the parties, reinforce, rather than rebut, this intention.

The trial court in this case adverted to certain letters written by one of the appellants, Dr. Hayward, as

strengthening the Court's conclusion that the agreement was a personal one. Before discussing those letters, we wish to make it clear that in this case we are not contending that the interest of Treasure Company, the lessee's interest which was assigned to Reconstruction Finance Corporation, is bound by the two for one agreement. de Bretteville, President of Treasure Company, testified in this case, as in the condemnation case, to the effect that he did not agree to the two for one arrangement with the appellants, and knew nothing about it at the time the money was paid in. [Tr. 215-218, incl.] In the condemnation case, this Court affirmed the holding of the trial court that Treasure Company was not a party to the agreement, and was not bound by it, and directed the payment to Reconstruction Finance Corporation of the lessee's share of the award, free of any lien of the two for one agreement, and free from any lien of the participating royalty holders for past production. That judgment is final, and the money has been paid over. Consequently we did not contend, at the argument or in the brief filed with the Court below, and do not now contend, that Treasure Company was bound by the two for one agreement. The appellants seek to enforce that agreement only against the interests of Scoville and The Adamant Company, or, in the alternative, against the interest of Scoville alone. In that connection, it may be observed that both Scoville and The Adamant Company held substantial royalty interests in the well, and both were benefited by the money advanced by the appellants, which was used to complete the well. Consequently, if both are bound by the agreement, they are severally as well as

jointly liable under Civil Code, Section 1659, which reads as follows:

“Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.”

It may also be observed that the document on its face indicates that it was within the contemplation of the parties that only the interests of Scoville and The Adamant Company would be bound by it. The letter agreement of September 27, 1938, refers to the application to the Commissioner of Corporations. This application in turn repeats the two for one agreement, stating:

“Applicant, Walter B. Scoville, desires to assist in completing said well, and certain of his friends and business associates are willing to advance the necessary funds, to be repaid two for one out of production.” [Tr. 82-83.]

The letter agreement sets forth the persons who are required to consent to this application, stating as the second of the conditions to the use of the money which was sent down with that letter the following:

“Second, when the said application herewith enclosed is fully executed by Walter B. Scoville, joined in and consented to by Treasure Company and J. Orville Seepie as Agent of Walter B. Scoville and The Adamant Company, and consented to by the Commissioner of Corporations of the State of California, and the said securities are transferred in escrow in favor of the undersigned, *provided that consent by Treasure Company is hereby waived in the event you are unable to get it*, and if in your judgment the well can be pushed to completion under present arrangements.” (Italics added.) [Tr. 80.]

On the face of the document, therefore, it is apparent that when the other parties to the document, Walter B. Scoville and The Adamant Company, agreed to its terms, they did so with the understanding that it was conceivable that Treasure Company might not come into the deal. It should be borne in mind, also, that the well was then being operated by a committee consisting of de Bretteville, Wynn and Seepie, Wynn being an employee of Treasure Company but siding with the Adamant group in a controversy which existed between them [Tr. 218], and Seepie was the agent of the Adamant group. [Tr. 34-35.] The agreement was made in September of 1938, and the well was completed under the management of the committee. de Bretteville did not take over until after that, in December of 1938. [Tr. 192, 230.] Scoville, undoubtedly for the purpose of assuring the appellants that his people were in control, so that 15% of the gross production could physically be obtained and applied on the obligation, told them of this situation, and also had assured them that his interest was entitled to enough production so that 15% of the gross could be taken out of his share of the net, to satisfy the obligation. This is shown by the uncontradicted testimony of Mr. Bullen. At page 131 of the transcript, there is the following:

“Q. Then will you answer the question, Mr. Bullen, as to what was said about Mr. Scoville’s position in the enterprise, and what his authority was, if anything? A. He said that he was the—practically the boss of it, that he was the representative of the major interests in the well; that he, The Adamant Company, Mr. Seepie, and some other minor interests were in control; . . .”

At page 133, he testified:

“Then, in answer to its operations, he gave me to understand that it would be operated under him by a committee of Joe Seepie, Harry Wynn and G. de Bretteville, . . .”

As to the interest of his group and Scoville's own personal interest being sufficient to take care of the appellants, Mr. Bullen testified [Tr. 144-145] as follows:

“Q. (By Mr. Hoge): Mr. Bullen, during the conversations which you had with Mr. Scoville prior to sending your money down and making this investment, did Mr. Scoville tell you what his interest in the venture was? A. Yes, he told us his interest was approximately, as I recall it, 19 per cent; The Adamant Company, of which his daughter was an officer, 25 per cent; Joe Seepie, 6 per cent; and Harry Wynn, approximately somewhere around 6 per cent.

Q. Did he say anything else in regard to those holdings of himself and his family? A. Anything else? I don't understand what you mean.

Q. I mean, did he make any comment at all as to the position of those holdings, or how they would affect your interests at all? A. Oh, yes. Those holdings, they are approximately the majority holdings.

Q. Just what he said now, Mr. Bullen, if anything, about that. A. He said: We are the majority holders. You are safe, you are absolutely safe. If the well comes in, you will get your royalties, plus your two for one. If it is a failure, you will get your 80 acres over in Baxter Basin, and *if there is any question, my own personal interest is sufficient to take care of you and myself.*” (Italics added.)

During cross-examination by Mr. Rice, Mr. Bullen further testified [Tr. 152-153], as follows:

“Q. Now, you spoke a moment ago of what Mr. Scoville had represented to you as the interest in the well, and you made some reference to 80 acres in some Basin, which you said he told you you would have in the event that the Treasure Well came in dry or was a failure. A. That’s right.

Q. Would you explain what that reference was to the 80 acres? A. Well, that is included in our letter to Mr. Halverson, where Walter Scoville, in the event the well was a failure he would give us, I think it reads, comparable interest in 80 acres in Baxter Basin, State of Wyoming.

Q. And that was acreage which he presumably owned himself, or controlled? A. Either that, or the Scoville Company, which he controlled, certainly.

Q. I see. Mr. Bullen, did you then, in making this deal with Mr. Scoville, ever look to the Treasure Company personally for the repayment of this debt, or was it between you and Mr. Scoville individually? A. We looked—

Mr. Allen: I will object to that as calling for a conclusion of the witness, your Honor.

The Court: That is all right. Overruled. Go ahead.

Q. (By Mr. Rice): You may answer, Mr. Bullen. A. We looked to the return of oil from the well on our two for one, which was to come out of 15 per cent of the first production from the well.”

This testimony furnishes the background against which the subsequent letters written by Dr. Hayward, to which the Court below refers, should be considered. The Court below says:

“This conclusion is reinforced by the contemporaneous letter written by Dr. Hayward, August

22, 1939, indicating the intention to consider the money advanced as a personal obligation of Scoville." [Tr. 95.]

Dr. Hayward wrote, under date of August 22, 1939, to de Bretteville, after appellants learned that de Bretteville had disclaimed any knowledge of the agreement, or liability of Treasure Company, for payment of the \$10,-000.00. The letter states in part:

"I am enclosing herewith our instructions to Mr. Geo. Halverson agreed to by Walter B. Scovell and Walter B. Scovell Company, under date of September 27, 1938 in which Mr. Scovell agrees to pay to Herschel Bullen and the undersigned 15% of gross production from the well until the \$15,000.00 is paid back two for one. We regard this as your authority if you are still operating the well to deduct from Mr. Scovell's account each month the equivalent of 15% of gross production and divide it between Mr. Bullen and myself.

"This in no way makes you responsible to Mr. Scovell or the Scovell Company as it was Mr. Scovell's suggestion and guarantee that we receive 15% of gross production from the well." [Deft. Ex. A.]

This letter, it is submitted, while it shows that the parties looked to Scoville for performance of the agreement, also shows that his property interest in the well was considered to be subject to a charge for payment of the amount owed to appellants. The letter may have some bearing on the question of the liability of Treasure Company, a point not in issue here, but it clearly reinforces, rather than weakens, our contention that the parties considered the obligation to be a charge on Scoville's in-

terest, whether or not Treasure Company was willing to subject its own interest to the obligation.

The Court below refers to another letter, as follows:

“And even the letter from the attorney Charles Franklin Johnson, dated September 26, 1938, speaks of it as a ‘contingency’, to avoid usury.” [Tr. 95.]

This letter is from an attorney, Charles Franklin Johnson, to Mr. Bullen, replying to his question as to whether or not the transaction might be considered usurious under the law of California. [Tr. 137-138.] The letter is Plaintiffs in Intervention’s Exhibit B-5. The relevant portion is as follows:

“As I understand your transaction with Mr. Scoville, he is obtaining certain money from you to be used in completing the well, for which he will cause to be transferred to you from him certain royalty interests now in escrow in his name. As a part of the transaction, it is to be agreed that the investment made by you will be returned two for one out of production. Where a person advances money and the repayment of the advance or of any profit or interest thereon depends upon a contingency, the transaction does not fall within the usury law. If I correctly understand this transaction, there will be no promissory note or other agreement to repay your money other than out of production from this property.”

This letter, we submit, negates, rather than supports, the idea of personal liability. There was to be no promissory note or other agreement to repay the money other than “out of production.”

The last letter to which the Court refers is Mr. Bullen’s letter to Halverson dated September 27, 1938, the

letter agreement itself upon which we rely, and we are inclined to agree with the Court's statement about this letter:

“In Bullen's letter to their attorney, Halverson, dated September 27, 1938, which is the basis of the claim, any personal liability which might go with ownership of production is rejected.” [Tr. 95.]

This statement on the part of the learned trial court must have been inadvertent, because its conclusion was that the obligation was personal. Nevertheless, as we interpret it, we think that it is a correct statement. When Scoville and The Adamant Company signed the endorsement on the letter, “We agree to the foregoing,” what they agreed to was that the money would come out of production from Treasure Well No. 8, and Scoville agreed that, if there was no production from that well, he would substitute other property in Wyoming. There is nothing in the letter to indicate that Scoville or anyone else would pay the money personally if neither property was productive. On the contrary, it is clear that there was no such obligation.

The situation would seem to be analogous to that in which security is given for payment of a sum of money, with a provision that there shall be no deficiency in the event the security is insufficient. It may be, as Dr. Hayward thought, that Scoville guaranteed that 15% of the gross production would be applied to payment of the obligation. When the agreement is viewed in the light of Scoville's representations, this would appear to be a reasonable interpretation. For the purposes of this case, however, it would seem to be sufficient that Scoville and The Adamant Company, if it is bound by the agreement,

a point which will be discussed later, consented that their property, to wit, their share of production from the well, would be subject to the obligation. That as holders of participating royalty interests they did have a property interest is, of course, established under the law of California, as shown above, and as this Court mentioned in its opinion in the condemnation case, *United States v. Adamant Co.*, 197 F. 2d 1, at p. 5, though the Court held, also, that they were not such interests as could be recognized and paid for as such in a condemnation proceeding, 197 F. 2d 1, at p. 12.

Under the agreement which The Adamant Company and Scoville had with Treasure Company, The Adamant Company had a 25% participating royalty interest, and Scoville a 19% participating royalty interest. [Tr. 31.] At the time of the condemnation, The Adamant Company still had a 25% interest, and Scoville had a 16% interest. *United States v. Adamant Co.*, 197 F. 2d 1, at p. 4, and the cash now held by the Court, in lieu of such interests, is \$47,925.00 for The Adamant Company, and \$30,672.00 for Scoville. [Finding VIII, Tr. 104.] Both Scoville and The Adamant Company, necessarily benefited, therefore, by the money which the appellants advanced, and which was used for completion of the well. Therefore, the obligations of Scoville and The Adamant Company under the agreement, whatever else they may be, are several as well as joint, by reason of Section 1659 of the Civil Code of California. It follows, that, if the shares of both are liable, or if only the share of Scoville is liable, the full amount of \$10,000.00 should be collected out of such shares, or share, except that there should be deducted from the \$10,000.00 a part to be apportioned to

the participating royalties held by the appellants, since, as Mr. Bullen recognized, their own share of the participating royalty, an aggregate of 2%, was likewise subject to the charge of 15% of gross production to be used to repay the \$10,000.00. [Tr. 146.] The conclusion that the full amount should come out of the shares of the parties to it, Bullen, Hayward, Scoville and Adamant, is strengthened by the fact, as noted above, that the agreement itself contemplated the possibility that Treasure Company might not sign, and that only Walter B. Scoville, Walter B. Scoville Company and The Adamant Company were required to sign.

To summarize the matter, it is submitted that, from the face of the agreement, as well as from the circumstances under which it was given, and the conversations of the parties, if and to the extent admissible for the purpose, and also the later letters, and testimony, if and to the extent admissible, the intention is clear that the only personal liability contemplated was a covenant on the part of those signing the agreement that 15% of gross production would be applied to payment of the obligation, and that the intention was, also, quite clear, we submit, that the share of production owned by any and all of those who joined in the agreement, including the shares of the appellants, would stand as security for payment of the \$10,000.00, and this is the legal effect of the agreement.

II.

The Decision by This Court in the Condemnation Case Does Not Preclude a Decision on the Merits in the Case at Bar of the Rights of the Appellants to Enforce the Two for One Agreement Against the Royalty Interests of Scoville and the Adamant Company.

It is not clear whether or not the trial court considered that the decision of Judge Westover and of this Court in the condemnation case precluded any holding that the letter agreement of September 27, 1938, created a lien upon or an assignment as security of the interests of the royalty holders, Scoville and The Adamant Company, as distinguished from the interest of the lessee, Treasure Company. At the conclusion of the oral argument the Court was apparently of the view that the agreement had the effect of an assignment, but that Judge Westover's decision determined the matter. The Court said:

"I may say that I am inclined to think that as we are dealing with persons who had no interest,—who were solicited, and not persons who were a part of the venture, that it may well be that the language recited by Mr. Scoville in the letter is broad enough to make an assignment or is broad enough to constitute, in reality, an assignment so that the statute of limitations would not begin to run until the fund came into existence.

"However, I am of the view, and I don't want any argument on that point, that so far as Bullen and Hayward are concerned, first, that the finding of Judge Westover is determinative of the matter, and, second, that if it is not, the facts in the case or the admissions contained in the letters by Dr. Hayward and others indicate that he was looking to Scoville,

and not to the Treasure Company. In other words, that the Treasure Company is not bound by the two for one agreement." [Tr. 237-238.]

We agree with the last sentence, of course, and contend that the condemnation case decided only that the two for one agreement created no lien in favor of the appellants on Treasure Company's interest. The above quoted statement seems to possibly indicate an inclination of the Court toward our view. However, in its final opinion, upon which the findings are based, the Court below, while it does not expressly rely on the language of this Court in the condemnation case, does return to the interpretation which that language suggests, that is to say, that the obligations under the two for one agreement were personal only.

In any event, the effect of the condemnation case is, of course, involved in this appeal, and we contend that the question now submitted for decision, that is to say, whether there exists a lien or charge upon the interests of the royalty holders in favor of the appellants under the two for one agreement, is not *res judicata*, for the reason that the judgment is not final as to the share of the award going to the royalty holders, their money being still held for disposition by the decision in this action, and for the further reason that the Court held in that case that the rights of the royalty holders, and necessarily, therefore, the rights of claimants against their royalty shares, could not be determined in that action. We further contend that the law of the case is not applicable for two reasons, to wit, that this is a different case, and that it would be unjust to apply that doctrine.

A judgment to be *res judicata* must, of course, be final. While the judgment in the condemnation case is final in the sense that no appeal can be taken from it, the judgment itself delegated to another Court the right and duty to determine the final amounts payable to the royalty holders, and the money which the Court found "other things being equal" (*United States v. Adamant Co.*, 197 F. 2d 1, at p. 13), would go to them, is now held in the registry of the Court. What they finally get will be decided in this action. As the Court said, "They may be entitled to more or less." (*United States v. Adamant Co.*, 197 F. 2d 1, at p. 12.)

The Federal Court sitting in a condemnation action is a Court of limited jurisdiction. It can exercise only the powers conferred upon it by the statute. The Court, with the aid of a jury, values the property which has been taken by the Government. Estates in and liens against the property are transferred to the fund thus awarded in payment. In the case involved here, the royalty holders did ask for adjudication of their rights, and for payment out of the fund. This Court, however, sustained only a limited adjudication of such rights, that is to say, an adjudication necessary to determine the rights of an assignee of the lessee's interest under the leasehold.

The lessee, Treasure Company, had assigned its interest to Reconstruction Finance Corporation. The assignment was subject to outstanding royalties, which, as the Court recognized, are property interests of a sort under California law. The assignee would take, therefore, only the interest in the award belonging to the lessee after deducting the share which would have to be reserved for its

royalty holders. The aggregate amount of the outstanding royalties thus had to be adjudicated, and, in order to find the aggregate amount, the individual percentages also had to be determined. This the trial court did, its holding thereon was affirmed by this Court, and the lessee's share was ordered to be paid over to its assignee. As to the remainder of the fund, however, that is to say, the share which was reserved for the royalty holders, the Court ordered that this amount be held by the Court pending the outcome of accounting suits between the royalty holders and the lessee, theretofore instituted and still pending, of which the case at bar is one.

This was on the theory that the holders of royalties issued by a lessee under an oil and gas lease entitling them to a share of the net proceeds of sale of the oil and gas produced from the well, are like stockholders in a corporation, and, of course, stockholders would have no right to come into Court and claim any share of a fund awarded as a result of condemnation of the corporation's property. It would be equally true that any person claiming a lien upon the shares of stock of a particular stockholder would have no place in such a suit, and his rights to such a lien could not be adjudicated therein.

So far as the claim of a lien upon the lessee's interest is concerned, the situation is different. In the condemnation case the appellants here did assert that the two for one agreement created a lien upon the interest of the lessee, Treasure Company. The appellants, in their capacity as royalty holders, and the other royalty holders, also claimed a lien against the leasehold for amounts claimed to be due to them from past production. The

Court held against both contentions. The money representing the lessee's interest was ordered paid over to its assignee, Reconstruction Finance Corporation, free and clear of any lien of the appellants under the two for one agreement, and free from any lien of the participating royalty holders for past production. The Court had, and exercised, jurisdiction to determine all encumbrances against the leasehold, and so these questions are *rei judicata*.

It may be that the Court, in its discussion of the two for one agreement, did not intend to go any further, and that it had in mind only the effect of the agreement, if any, upon the lessee's estate. The language is broad, but there is no specific discussion of the rights of these appellants as against Scoville. If it can be interpreted as going any further than a holding that the lessee's estate was not bound, the statements cannot be given effect, because of the Court's own ruling as to its limited jurisdiction. In *2 Freeman on Judgments* 1546, Section 743, the author states:

"There can be no doubt that the dismissal of an action or denial of relief for want of jurisdiction is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it. No question other than the jurisdictional one is concluded by such judgment, since after a court has determined its lack of jurisdiction, any further finding or judgment as to the matters alleged is wholly ineffective."

In the condemnation case, this Court, while recognizing, as noted above, that royalty holders, under California law, have a property interest of a sort, points out

that under California law such interests are securities, 197 F. 2d at 6, and it treats the participating royalty holders for the purposes of the condemnation case as if they were stockholders of a corporation, saying at page 12:

“So a court can no more divide the proceeds of a sale of a leasehold interest among the lessee’s participating royalty holders, than it could divide the proceeds among the stockholders of a corporation prior to dissolution.”

Again, the Court, at the same page, in referring to the royalty holders and the possible outcome of the accounting actions, said:

“They may be entitled to more or to less. But until those actions are actually determined no court can order the payment of these awards without inviting further litigation.”

These statements of the Court, together with its ruling that the percentages of the award which, other things being equal, would go to the royalty holders, should be withheld until further adjudication of their rights, would seem to bring the case squarely within the rule as stated above by Mr. Freeman.

A case which is a good illustration of the rule is *City of Pocatello v. Murray*, 21 Idaho 180, 120 Pac. 812 (1912). This was an action by the City of Pocatello against the defendant Murray, who owned and operated the water system which supplied the city with water. The complaint sought a writ of mandate to compel the defendant to appoint commissioners to act with others pursuant to a recently enacted state law, for the purpose of fixing the rates charged by the defendant for water. The defendant set up two defenses; first, that the existing

rates were established by a contract between him and the city, as embodied in an ordinance adopted by the city long before the enactment of the state law, and that to enforce the state law would impair his contract, and deprive him of property without due process of law; and, second, he pleaded that the matter was *res judicata*, the first defense having been decided in his favor in another case.

It did appear that the city had filed a suit in equity against the defendant in the Circuit Court of the United States, asking that Court to fix reasonable rates under the state statute in question, and that the Court had sustained a demurrer to the bill on two grounds, one of these being that the state statute was unconstitutional, and the other being that it would not be proper for the Court to fix water rates, which the Court said was a matter for legislative or administrative action rather than a judicial function. (*City of Pocatello v. Murray*, 173 Fed. 382.)

The Supreme Court of Idaho held that the statute was not unconstitutional, because the water rights, under the state constitution, were held in trust for the people, and subject to control by the legislature, so that the city had no power to make a contract which would prevent future legislative action; and it ruled against the defendant on the *res judicata* point, saying at page 816 of the Pacific report:

“As we understand it, where a case is disposed of on the ground that the court has no jurisdiction to hear and determine the matter, it has no jurisdiction to pass upon any question except the jurisdictional question.”

This decision of the Supreme Court of Idaho was affirmed by the Supreme Court of the United States. (*Murray v. Pocatello*, 226 U. S. 318, 57 L. Ed. 239.) The Court held that it would not interfere with the decision of the Supreme Court of Idaho interpreting the state constitution, and that the matter was not *res judicata*. In its discussion of the latter point, the Court said at page 324 of 226 U. S., and at page 242 of 57 L. Ed.:

“Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in *Ontario Land Co. v. Wilfong* (citations), and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached.”

Another case which illustrates the principle is *Robertson v. Gordon*, 226 U. S. 311, 57 L. Ed. 236 (1912).

This was an action by an attorney against another attorney seeking to enforce a contract for division of fees and repayment of expenses, and to impress with a lien a sum which had been awarded by the Court of Claims as attorney's fees in the case out of which the agreements arose. The agreement to repay expenses provided that such expenses would be repaid “*out of my share of the profit.*” (Italics added.)

The Court of Claims had not only determined the total attorney's fees, but the division to be made thereof, and had ruled against the attorney who was the plaintiff in this action.

The Supreme Court held that the plaintiff was entitled to recover, and that the ruling of the Court of Claims

did not make the matter *res judicata*, because that Court had jurisdiction only to determine the aggregate amount due to all the attorneys.

It follows, we submit, that if and to the extent that a discussion by this Court of the two for one agreement was intended as a ruling on the question of whether or not it created a lien upon the interests of the royalty holders who were parties to it, as distinguished from the interest of the lessee, it cannot be given such effect, because of the express holding of the Court that the rights of the royalty holders would have to be decided in another action; and because their rights have still not been finally decided, but will be in the case at bar. *A fortiori*, the rights of claimants asserting a lien against the royalties of those parties could not have been decided, and will have to be decided in this case.

For the same reasons that the case is not *res judicata*, the remarks of the Court, if they are to be interpreted as dealing with the right of the appellants to reach the royalty interest of Scoville or Adamant under the two for one agreement, should not be considered binding upon the Court in the case at bar, under the doctrine of "the law of the case." This rule applies only to a retrial of the same case. (*Fidelity & Deposit Co. v. Port of Seattle*, 106 F. 2d 777 (C. C. A. 9, 1939.) This was an action on a surety's bond commenced in the State Court and removed to the Federal Court. There had been a prior action on the same bond by the same parties brought in the State Court and dismissed for failure to comply with the Court's order requiring different causes of action to

be separately stated. On the point under discussion, this Court said at page 781 of the report in 106 F. 2d:

“It is also evident that the proceedings in the state court action do not in any way provide a ‘rule of the case’ to be followed in the present action, because that doctrine is confined in its operation to subsequent proceedings in the *same* case.” (Italics by the Court.)

Judge Hall said in his memorandum permitting the appellants to intervene:

“While the Circuit Court affirmed the holding of the trial court that ‘the enforcement of the so-called “two for one” agreement between the Bullens and the Haywards and Walter B. Scoville is a personal matter and is not a matter for settlement in the within case’, it is to be noted that the holding was confined to the ‘within case’, viz.: the condemnation case. I do not regard such a holding as precluding the Bullens and the Haywards from intervening in this case which is certainly an entirely different case than the condemnation case.” [Tr. 65.]

Furthermore, the doctrine of the law of the case is not applied where it would be unjust to do so. In *England v. Hospital of the Good Samaritan*, 14 Cal. 2d 791, at 795, 97 P. 2d 813, at 814, the Court said:

“The doctrine of the law of the case is recognized as a harsh one (2 Cal. Jur. 947) and the modern view is that it should not be adhered to when the application of it results in a manifestly unjust decision. *United Dredging Co. v. Industrial Acc. Comm.*, 208 Cal. 705, 284 P. 922. However, it is generally followed in this state. But a court is not absolutely precluded by the law of the case from reconsidering questions decided upon a former ap-

peal. Procedure and not jurisdiction is involved. Where there are exceptional circumstances, a court which is looking to a just determination of the rights of the parties to the litigation and not merely to rules of practice, may and should decide the case without regard to what has gone before. *Messinger v. Anderson*, 225 U. S. 436, 32 S. Ct. 739, 56 L. Ed. 1152; *Seagraves v. Wallace*, 5 Cir., 69 F. 2d 163; *McGovern v. Eckhart*, 200 Wis. 64, 227 N. W. 300, 67 A. L. R. 1381."

It would, we submit, be unjust to apply the doctrine in this case, because it would mean that the people who gambled in supplying money for a wildcat oil well, which was successfully completed, would be deprived of the bargain voluntarily offered to them; and also because the opinion upon which such a ruling would be based contains, we respectfully submit, a number of errors in its application to the problem here presented.

The opinion places reliance upon *Helvering v. O'Donnell*, 303 U. S. 370 (1938), a case which held that the holder of an agreement entitling him to a percentage of the net profits from the operation of oil properties was not entitled to the 27½% depletion allowance which is permitted to be deducted from income from oil properties under the Federal income tax law. The opinion of the Supreme Court does not discuss the question of whether the holder of the agreement would have the right to specific performance under California law, and that would be an immaterial question in a tax case, but in the case at bar, where the jurisdiction of the Federal Court depends only on diversity of citizenship, California law is controlling. (*Erie Railroad v. Tompkins*, 304 U. S.

64, 82 L. Ed. 1188.) Federal tax law must, of course, be uniform. As the Court said in *Burnet v. Harmel*, 287 U. S. 103, at 110:

“Here we are concerned with the meaning and application of a statute enacted by Congress in the exercise of its plenary power under the Constitution to tax income. The exercise of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language expressing a different purpose, is to be interpreted so as to give a uniform interpretation to a national scheme of taxation.”

In *Commissioner of Internal Revenue v. Southwest Exploration Co.*, 220 F. 2d 58, this Court affirmed the decision of the Tax Court, which had held, in an opinion citing *Helvering v. O'Donnell*, that a company which had furnished drill sites for offshore drilling operations in California, in consideration of which it was to receive a percentage of the net profits from the wells, was not entitled to the depletion allowance. This was reversed by the Supreme Court in *Commissioner of Internal Revenue v. Southwest Exploration Co.*, 16 U. S. S. Ct. Bulletin (C. C. H.) 417, decided February 27, 1956. It would seem from this that *Helvering v. O'Donnell* is no longer good law even in the tax field, though it was not expressly overruled. But the significant point is that neither the Tax Court nor this Court, nor the Supreme Court of the United States, in deciding the depletion cases, cited any California case. By the same token, we submit that a Federal tax case should have no bearing on the problem now before this Court.

It may be noted, also, that the *O'Donnell* case interprets an agreement dealing with a share of net profits, whereas the two for one agreement relates to gross production. The *O'Donnell* case apparently turned on the point that O'Donnell had only an interest in net profits, which might not materialize, even though there was production. The case would seem to be in point only for the proposition that such an interest is too evanescent to be recognized as a property interest, compensable as such, in a Federal condemnation case and that the rights of persons claiming a lien against it cannot be considered either in such a case.

At page 9 of the opinion in 197 F. 2d 1, the Court refers to a previous State Court decision, being one of the first actions between Scoville and de Bretteville, in which it had been held that Scoville's group lost the right of management because the well when completed was good for not more than 200 barrels per day. The Court said:

“The judgment in the State Court determined that Adamant, Scoville and Wynn, ‘had no right of management in the undertaking’ (Scoville v. de Bretteville, 1942, 50 Cal. App. (2) 622, 632, 123 Pac. 2d 616, 621). This adjudication fixed the measure of their rights as they existed at the time the letter to the Bullens and Haywards was written.”

The last sentence of this is a mistake. The well was completed under the direct management of Seepie, who was the agent of the Scoville-Adamant group, on the executive committee. It was completed in December of 1938 [Tr. 191 and 230], and, of course, it was not until after completion that the amount of production was determined,

as a result of which the Scoville-Adamant group lost the right of possession and management whereas the money of the appellants had been sent down to Los Angeles with their letter of September 27, 1938 [Tr. 79 and 134], and that money was used in the completion of the well. [Tr. 106.]

In the last paragraph of the footnote at page 9 of the opinion, the Court apparently refers to the difference between agreements and assignments, and cites two cases to the effect that the holders of warrants for stock are not considered stockholders. This, of course, is true, but the warrants involved in those cases were merely options to buy stock, whereas in our case there was an agreement which had been executed by the appellants furnishing the consideration. The fact that it is in form an agreement is immaterial, *Dougherty v. California Kettleman Oil Royalties, supra*. Even if it started as an option, it would, after exercise, give a vested interest under California law. (*Gavina v. Smith, supra*.)

The Court, at page 9, distinguishes two Oklahoma cases, one of which, *Phillips Petroleum v. Gable*, 128 F. 2d 943 (C. C. A. 10, 1942), is on all fours with the case at bar. The distinction is made by the Court on the ground that the Oklahoma cases depended upon a statute which expresses the doctrine of potential possession. Here, as noted above, the Court overlooked the fact, as did counsel also, and it was not called to the Court's attention, that the California statute, Civil Code,

Section 2883, is the same as that of Oklahoma, *in haec verba*.

Finally, it may be noted that there were a great many issues in the condemnation case, and this fact is one of the elements which may be considered in deciding the effect of it. As stated in Bigelow on Estoppel (6th Ed.), Section 179, note:

“The reason why there is no estoppel concerning matters not necessarily involved in the decision of a case is that, from the very fact that they were not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue the decision of which would determine the case.”

The issue of whether or not the two for one agreement was secured by an assignment in the nature of a trust deed or a lien upon the royalty interests of Scoville and/or The Adamant Company, as distinguished from the lessee's interest, was not, as pointed out above, properly involved in the condemnation case, because it was held that such royalties were not compensable in a Federal condemnation case, from which it follows that the claims of creditors to a lien upon or other security interest in such royalties could not be adjudicated by the Court in that matter.

III.

The Complaint in Intervention Seeking to Enforce the Security of the Two for One Agreement Against the Royalty Interests of the Parties Thereto Is Not Barred by the Statute of Limitations.

The question of whether the complaint in intervention is barred by the statute of limitations depends upon the substantive analysis of the two for one agreement. If it creates a security interest in the royalties of the obligors, it is not barred. If it is a mere personal covenant, it is barred by the four year statute. This is simply a question, as we see it, of whether the agreement means that the money was to be paid "out of" production, or, as the trial court held, "when" production was obtained, and the point has been fully discussed.

There are two approaches to the statute of limitations question, depending upon whether the security interest, which we will assume for this purpose was created by the agreement, is treated as being in the nature of a trust deed, or whether it is a lien, but both approaches give the same result.

In *Recovery Oil Co. v. Van Acker*, the statute of limitations point was decided on the second appeal, 96 Cal. App. 2d 909, 216 P. 2d 483. There the respondent held an assignment entitling her to 15% of the gross production of certain oil property until she had received \$10,000.00. In our case, the appellants hold an agreement which entitles them to the same thing, the only difference being that in one case words of present assignment are used, and in the other, words of agreement. This is immaterial as heretofore noted under the California

law relating to oil rights, an agreement which has been executed, by the promisees' furnishing the consideration for it, creates a present legal interest. (*Gavina v. Smith, supra.*) The Court, in the *Van Acker* case, held that, notwithstanding the fact that more than four years before the action was filed the property had produced sufficient amounts so that the respondent could have been paid from production, her rights were not barred by the statute, the Court saying at page 912 of the report in 96 Cal. App. 2d, and at page 485 of the report in 216 P. 2d:

“Any obligation to pay was not only a continuing one but she had an interest in the land which did not terminate until she actually received that amount of money. Her interest was vested as an estate, and not as a lien. Her position was similar to that of the holder of a trust deed.”

Under California law an action by the beneficiary to compel performance of the trust, *e. g.*, an action against the trustee to compel a sale, is not barred by the statute, though an action on the debt may be. (*Sacramento Bank v. Murphy*, 158 Cal. 390, 115 Pac. 232.) The *Van Acker* case apparently holds that an assignee for security of oil rights is both the trustee and the beneficiary. In our case, the property was taken from the trustee-beneficiary when the Government condemned the fee, and it would seem that the complaint in intervention could be regarded as an action to recover the trust property.

Whether this is true or not, and whether or not the action is considered to be one to foreclose, and even if the security is considered to be only a lien, it is not barred by the statute. (*Rose v. Conlin*, 52 Cal. App. 225, 198

Pac. 653 (hear. den. by S. Ct., Jan. 9, 1921).) This case involved the foreclosure of a mortgage, which, under the California law is, of course, only a lien. Part of the property securing the mortgage was condemned, and it was held that an action by the mortgagee to apply the condemnation award to satisfaction of the unpaid balance on his mortgage was not barred, because the statute of limitations did not begin to run until the judgment making the award became final, at which time the substituted *res* became available. This case was relied upon by Judge Peirson M. Hall in holding that the statute of limitations did not apply, when he granted the motion for leave to intervene. His discussion is as follows:

“*Rose v. Conlin*, 52 Cal. App. 225, is authority for the proposition that the cause of action in that case arose when there was a *res* to which the remedy sought could be applied; and also as authority for the proposition that the claimant in that case *could* have intervened in the suit which resulted in a money judgment constituting the *res*. In that case a controversy arose concerning foreclosure of mortgages and a taking by the Southern Pacific Railroad which the court finally held was a condemnation and gave a money judgment. The holder of a deficiency on a mortgage foreclosure did not intervene in the litigation which resulted in the condemnation judgment, but chose rather to sue after the award for the condemnation was made. The court held that the statute did not begin to run until the award was made and the judgment for money, *i. e.*, the *res* came into being.

“Applying the doctrines of that case to the instant one it appears that the ‘two for one’ agreement called for the payment of money out of production of an

oil well. But before the oil well could produce sufficient money to satisfy the agreement the government condemned and took the property. On a jury trial an award was made for the taking, which included the value of future production; and Scoville's interest in future production was not determined until the time that judgment became final. The judgment may well have been in the condemnation suit that the future production of the well had no value. The statute began to run, not from the date that the government took the property in 1942, but rather began to run at the time the awards were made final, which was not until the mandate from the Circuit Court in July, 1952. It was not until the mandate came down that Scoville's interest in the award was fixed as the sum of \$30,672. That money is on deposit in this court. Under the opinion of the Circuit Court this money cannot be distributed until the within accounting action is determined. It follows that the statute of limitations has not run and that the proposed complaint in intervention is timely."

If it be considered, contrary to the *Van Acker* holding, that the statute began to run after production was obtained, and the stipulated percentage not paid over, it may be observed that the well was not completed until the middle of December of 1938, and the property was condemned less than four years after that, to wit, on September 28, 1942, so that the statute had not run, even as to the earliest production, when it was interrupted by the condemnation.

It follows, we submit, that if the Court finds that the two for one agreement did create a security interest in the share of production owned by the participating royalty

holders who were parties to it, whatever the nature of that security, whether it be analyzed as a trust deed or a lien, the enforcement of it by means of the complaint in intervention in this case is not barred by the statute of limitations.

IV.

In Addition to Walter B. Scoville, The Adamant Company Is Also a Party to the Two for One Agreement, and Is Bound by It.

It is not clear from the opinion of the trial court in this case, or from the findings of the Court, whether or not it was the Court's view that The Adamant Company executed the two for one agreement. In its opinion, the Court first says:

“ . . . that the plaintiffs in intervention had only a personal claim against Scoville for double the amount of the \$5,000.00, and that the agreement to pay that amount was merely an agreement to pay when the returns from the first 15% of production came in.” [Tr. 95.]

But later on in the opinion the Court says:

“The final determination announced that the undertakings towards the Bullens and Haywards by Scoville *and the Adamant Company* were personal obligations which are barred by the statute, is, of course, mine.” [Tr. 96.] (*Italics added.*)

In Finding IX, the Court found:

“On or about the 27th day of September, 1938, plaintiffs-in-intervention Herschel Bullen and J. C. Hayward entered into a certain contract in writing with defendant-in-intervention Walter Scoville where-

by said plaintiffs-in-intervention agreed to advance the sum of \$5,000.00 for the purpose of completing and bringing into production said Treasure Well No. 8." [Tr. 105.]

In Finding XI, reference is also made to the letter of September 27, 1938:

" . . . the terms of which were agreed to in writing by defendant-in-intervention Walter B. Scoville,"

and yet further on in the same finding appears the following:

"A true copy of said letter, and of the agreement endorsed thereon by defendants-in-intervention Walter B. Scoville and *The Adamant Company*, is attached to the complaint-in-intervention herein and marked Exhibit A, . . ." [Tr. 106.] (Italics added.)

In view of the Court's holding that the agreement did not create a security interest in production owned by the obligors thereunder, and that it was, therefore, barred by the statute of limitations, the question was immaterial from the Court's viewpoint. If the Court erred in this holding, the point becomes material, and the appellants have assigned as error the Court's finding, if it did so find, that the agreement was made only by Walter B. Scoville. [Tr. 115-116.]

In the condemnation case, Judge Westover found that the agreement had not been executed by The Adamant Company, and was not binding upon it, and there is a *res judicata* question as to this. However, in view of the facts, hereinabove pointed out, that the judgment in that case did not dispose of the royalty holders' shares of production, and so was not a final determination of their

rights, or of creditors' claims against their shares, and the Court having declined to take jurisdiction of the rights and obligations of the royalty holders, except as necessary to determine the remaining share of production owned by the lessee after making the royalty assignments, it is submitted that this finding in the condemnation case, being one which has no bearing on the lessee's rights, is not *res judicata*. As the Court said in *Guardianship of Leach*, 30 Cal. 2d 297 at 311, 182 P. 2d 529 at 536:

“ . . . it is well settled that the findings and conclusions of the court do not have the force and effect of an adjudication *where the subject matter is not disposed of by the judgment*. The force of an adjudication rests in the judgment itself, *and findings not necessary to the judgment are in no wise conclusive*.” (Italics added.)

It is believed that the evidence shows that the agreement was executed by The Adamant Company, both by an officer, Helen Scoville, and by its agent for the particular transaction, J. Orville Seepie, and that it was binding upon it for that reason, and also because it received the benefits of the bargain.

The original of the letter agreement of September 27, 1938, has been lost, and was not available either for the condemnation case or this case. Mr. George Halverson, the Los Angeles attorney to whom the plaintiffs in intervention sent the letter of September 27, 1938, testified in the condemnation case, and his testimony was used in this case, that he handled the transaction by having the terms of the letter agreement agreed to by The Adamant Company, The Walter B. Scoville Company, and Walter B.

Scoville. [Tr. 172.] He further testified to the effect that he relied upon Walter B. Scoville to obtain the signature of The Adamant Company. The testimony on the latter point is as follows:

“Q. Will you state whether or not you can testify that the signature of The Adamant Company, by Helen Scoville, secretary, was on the original of that?
A. I can.

Q. What is your answer to that? Was it or was it not? A. It was on it.

Mr. Hoge: That is all.

The Witness: Of course, I didn't see her write it, but I know it was there.

Q. (By Mr. Hoge): You saw the signature?
A. It was produced by Mr. Walter B. Scoville.

Q. Do you know Mrs. Scoville's signature? A. I don't think I know Mrs. Scoville. I know her father very well, but I don't think I know Mrs. Scoville.

Q. Do you know her signature? A. I wouldn't say that I do.

Q. You say it was produced by Walter B. Scoville and The Adamant Company. What did he tell you about it, if anything? A. He just told me that was, I am sure, that it was the signature of The Adamant Company, by his wife, Helen Scoville.

Q. Did he say anything to you in that connection?
A. I can't remember that far back.

Mr. Bodkin: It was stipulated yesterday that that was her signature, and she was authorized to bind the company, according to my recollection.

Q. Mr. Halverson, may I ask you, referring again to this letter—this is a question by Mr. Hoge again—Petitioners' Exhibit 9 from Messrs. Young

& Bullen, I ask you to read that paragraph. A. Yes, sir.

Q. Can you state that you had in your possession the original of that document, signed and executed by The Adamant Company? A. It was on the letter from Herschel Bullen and Dr. Hayward, on the bottom of the letter. Yes, I had the original letter in my possession for many years, I know that.

Q. And did it have what purported to be the signature of The Adamant Company, by Helen Scoville, upon it? A. It did, yes, sir.” [Tr. 173-174.]

In the case at bar, the deposition of Walter Scoville was taken, and he testified as follows:

“Q. I understand, Mr. Scoville, a copy of that letter-agreement which has been referred to is on file having been attached as Bullen and Hayward in intervention in this matter. A. I understand so but I don’t know. I have no way of telling.

Here, again, your Honor, he is talking about Exhibit B-1, the letter of September 27, 1938.

The Court: All right.

Mr. Hoge (Continuing reading):

Q. When you said you okehed it, did you actually subscribe your name to it? A. Yes, right on the letter.

Q. Did the Adamant Company also okeh that letter? A. Yes, indeed. We okehed the terms and conditions under which those monies should be turned over.

Q. Can you recall who signed for the Adamant Company at that time? A. No, I cannot.

Q. I believe the document shows Helen Scoville signed for the Adamant Company. Was she an officer at that time? A. She was.

Q. Were you an officer? A. No, I have never been.

Q. Who were the stockholders at that time? A. All of my children. It was formed in 1935 as an organization of the family.

Q. Who is Helen Scoville? A. That is one of my daughters.

Q. Were you present when she signed? A. I do not know.

Q. You do know the Adamant Company agreed to it? A. She had authority." [Tr. 182-183.]

In addition to the foregoing, J. Orville Seepie was the agent of The Adamant Company for the purposes of the drilling and management of the well, being appointed as such by the original agreement between Treasure Company, Scoville and The Adamant Company [Tr. 34], and it appears from his testimony in this case that he was acting with Scoville in raising money to complete the well, and specifically in the transaction with appellants. He testified:

" . . . we raised part of the money from Mr. Bullen and Dr. Hayward, and some others, and we completed the well." [Tr. 188.]

On cross-examination by Mr. Rice, he testified as follows:

"Q. Mr. Seepie, did you ever undertake to act for Mr. Scoville or for The Adamant Company in this activity of finding the funds to refinance this,— I mean to complete the well? A. Yes." [Tr. 196.]

He also acted in the disbursement of the money. Mr. de Bretteville testified as follows:

"The Court: That money—this money that they derived from these side agreements, we might call

them, was that turned over and was that in the name of Treasure Company or of this group by a trustee?

The Witness: No, it was put into a trust fund that was called the Treasure Company Trust Fund No. 1.

The Court: And that is the money from Mr. Bullen and Dr. Hayward.

The Witness: Yes, sir.

The Court: That money, so far as you were concerned, came to you or to Treasure through Scoville?

The Witness: Yes, it was put into a trust fund that Mr. Seepie and I signed the checks on." [Tr. 229-230.]

The Court found that:

"Pursuant to said agreement plaintiffs-in-intervention advanced the sum of \$5,000.00, and said money was used as part of the funds by which said oil well, Treasure Well No. 8, was placed on production. . . ." [Finding XII, Tr. 106.]

The two for one agreement is contained not only in the letter agreement of September 27, 1938, but also in the application to the Commissioner of Corporations, as hereinabove noted, which refers to the necessary funds "to be repaid two for one out of production." [Tr. 83.] Among other signatures to this application was the following:

"J. Orville Seepie, as agent of Walter B. Scoville and The Adamant Company, does hereby join in and consent to the foregoing Application and the transfer therein referred to.

The Adamant Company,
By Helen Scoville, Secretary
J. Orville Seepie." [Tr. 84.]

It is submitted, therefore, that the testimony established that the two for one agreement, as embodied in two documents, was signed by the authorized representative of The Adamant Company, the letter agreement being signed by Helen Scoville, who, according to the testimony of Walter B. Scoville, her father, was an officer and had authority to sign, and the other document, the application being signed by J. Orville Seepie, a duly appointed agent of The Adamant Company, who acted for it in this transaction. The Adamant Company benefited from the transaction, by which appellants' money was used to complete the well, that company having a 25% royalty interest, and it is not in a position to raise any question of lack of formal authorization.

If, as we believe, The Adamant Company is bound by the agreement, the total production subject to the lien is as follows:

The Adamant Company	25% or	\$47,925.00
Walter B. Scoville	16% or	30,672.00
Herschel Bullen and Mary H. Bullen	1% or	1,917.00
J. C. Hayward and Marian S. Hayward	1% or	1,917.00
Total		<u>\$82,431.00</u>

Deducting the portion which should be charged against
3,834

the interests of the appellants, being 82,431 of \$10,000.00,
 or \$465.11, the remaining \$9,534.89 should be charged
 proportionately to the shares of Walter B. Scoville and

47,925
 The Adamant Company, these proportions being 82,431

of \$10,000.00, or \$5,826.08, to The Adamant Company,
30,672
 and 82,431 of \$10,000, or \$3,708.81, to the share of
 Walter B. Scoville. The total charges would thus be as
 follows:

To the appellants	\$ 465.11
To The Adamant Company	5,826.08
To Walter B. Scoville	3,708.81
	<hr/>
Total	\$10,000.00

If The Adamant Company is not bound by the agree-
 ment it would seem clear that Scoville's interest is subject
 to a charge for the full \$10,000.00, less an amount ap-
 portionable to the 2% interest of the appellants. Sco-
 ville's attorney, Halverson, who was also acting as the
 attorney for the appellants in this matter, left it to Sco-
 ville to obtain the execution of the agreement by his
 family company, The Adamant Company, and there is
 no question but that Scoville, in effect, represented to
 Mr. Halverson that he had obtained its execution. Fur-
 thermore, the appellants had dealt with Scoville alone in
 the transaction, they looked to him for performance, and
 he represented to them that his personal interest alone
 would be sufficient to pay them. [Tr. 145.] Under
 these circumstances, it would seem, also, that Scoville's
 share should bear the burden of any failure to obtain the
 approval of the transaction by The Adamant Company.
 The remaining interest of Scoville is more than enough to
 satisfy the obligation, even if Adamant Company is not

bound by the agreement. Assuming it is not bound, the total production subject to the lien or charge of the agreement is as follows:

Walter B. Scoville	16% or	\$30,672.00
Herschel Bullen and		
Mary H. Bullen	1% or	1,917.00
J. C. Hayward and		
Marian S. Hayward	1% or	1,917.00
Total		<hr/> \$34,506.00

Of this total, an aggregate of \$3,834.00 is owned by the appellants. If Scoville is not held responsible for failure to obtain Adamant's approval, there should be deducted

3,834
 34,506 of \$10,000.00, or \$1,111.11, and the remaining \$8,888.89 should be charged to the share of Walter B. Scoville. If Scoville's share is to be charged with the effect of the failure to obtain Adamant's signature, there would be deducted for appellants' share the same amount as if Adamant had signed, and the resulting charges would be:

To the appellants	\$ 465.11
To Walter B. Scoville	9,534.89
Total	<hr/> \$10,000.00

Conclusion.

It is submitted that the judgment of the Court below should be reversed; and that the mandate of this Court should direct that there be paid to the appellants from the money held by the court in the condemnation case the sum of \$5,826.08 from the share of The Adamant Company and the sum of \$3,708.81 from the share of Walter B. Scoville; or, if the Court finds that The Adamant Company is not bound, that there should be paid to the appellants the sum of \$9,534.89 from the share of Walter B. Scoville.

Respectfully submitted,

HOGGE & PERRY,

By FULTON W. HOGGE,

*Attorneys for Appellants Herschel Bullen,
Mary H. Bullen, J. C. Hayward and
Marian S. Hayward.*

No. 14,898

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLIE EARL FRAZIER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.



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No. 14,898

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLIE EARL FRAZIER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Sections 1291 and 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant was indicted on February 11, 1954 in five counts for a violation of the narcotic laws of the United States together with Theodore Frazier, Evelyn Dyer and Emma Crawford. Appellant was charged in the fifth count of the indictment with selling 85 grains of heroin, in the sixth count with concealing 85 grains of heroin, in the ninth count with selling 48

grains of heroin, in the tenth count with concealing 48 grains of heroin and in the eleventh count with conspiracy to sell and conceal heroin. Appellant was tried by a jury before United States District Judge George V. Harris of the Northern District of California, and was convicted on all of the counts in which he was named in the indictment. On April 16, 1954 appellant was sentenced to four 5-year terms to run concurrently on Counts 5, 6, 9 and 10 of the indictment and in the eleventh count of the indictment to a 5-year term to run consecutively to the term imposed under the other four counts of the indictment.

No request for an entrapment instruction is contained in the record on appeal although all instructions refused are so included. No appeal was taken from the judgment of conviction.

On July 21, 1955 appellant moved to vacate his sentence pursuant to Section 2255 of Title 28 United States Code. In his petition appellant made four contentions: (1) that he was entrapped, (2) that he was convicted by the knowing use of perjured testimony, (3) that he was denied a fair trial, and (4) that the sentencing court had no jurisdiction.

In support of his first contention appellant apparently alleges that he had no desire to violate the narcotic laws and was persuaded to do so by one Marjorie Gray. In support of his second contention, that he was convicted by the use of perjured testimony, appellant alleges that Miss Gray testified that she had not received any money from Agent Perry for her personal use nor was promised a reward. He further

alleges that this perjury was knowing because following a visit by the United States Attorney and the Agent during a recess of the trial, Miss Gray changed her testimony and agreed that she had received money for her personal use and was promised a reward. In support of Contention No. 3 appellant alleges that the Agent and the United States Attorney talked to Miss Gray contrary to the orders of the trial judge. Contention No. 4 was merely a repetition of Contentions Nos. 2 and 3.

On August 5, 1955 Judge Harris denied appellant's motion to vacate and set aside sentence. Appeal was then made to this Court.

QUESTIONS PRESENTED.

1. Can entrapment be urged in a collateral attack upon a judgment of conviction?
2. Is there knowing use of perjured testimony when after a witness tells an incorrect story she changes her testimony to correspond to the facts?

ARGUMENT.

I. ENTRAPMENT CANNOT BE URGED ON COLLATERAL ATTACK.

Appellant did not appeal from the judgment of conviction in this case. The proceeding here is merely a collateral attack on the judgment. Appellant does not argue that a question of entrapment was requested and refused. He merely claims that he was entrapped

and is entitled to his release. As this Court said in *Hastings v. United States* (9th Cir. 1950), 184 F.2d 939, "Prisoners adjudged guilty of crime should understand that 28 U.S.C.A., Section 2255, does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them."

Entrapment is a defense which should be urged to the jury. It is not a claim which can be urged on collateral attack of a judgment. See *United States v. Spadafora*, *infra*, at 142.

II. THERE WAS NO KNOWING USE OF PERJURED TESTIMONY.

In the instant case appellant does not allege that the United States Attorney allowed the use of perjured testimony. His claim is that the witness first perjured herself and then was induced by the United States Attorney to correct her story.

A defendant has the burden of showing that testimony alleged to be perjured is material. *Cobb v. Hunter* (10th Cir. 1948), 167 F.2d 888; *United States v. Spadafora* (7th Cir. 1952), 200 F.2d 140, 142. Here the alleged perjured testimony involves no more than a denial of impeaching material. The testimony alleged to be perjured does not go to the guilt of the defendant but merely to the bias of the witness.

It could not be urged as grounds for a new trial, if discovered. Merely impeaching evidence is insufficient in such a motion. *Wagner v. United States* (9th Cir. 1941), 118 F.2d 801; *Balestreri v. United States* (9th Cir. 1955), 224 F.2d 915, 917; *Gage v. United States* (9th Cir. 1948), 167 F.2d 122. The same rule applies when merely impeaching matter is urged on collateral attack.

Here, however, the amazing part in appellant's claim is not that this testimony was allowed to stand but that the United States Attorney caused the witness to change her testimony to correspond with that which appellant claims is the true fact. When a United States Attorney discovers that a witness per-jures himself or herself, there is no clearer duty than that this matter be immediately brought to the attention of the jury. This the United States Attorney did here. Nothing more is required.

CONCLUSION.

The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
February 13, 1956.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14900

**United States
Court of Appeals**
for the Ninth Circuit

R. N. B. CONVERSE, Doing Business as Converse
Trucking Service, and CHESTER A. BOYLE,
Appellants,
vs.

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Oregon**

FILED

JAN 25 1956

No. 14900

**United States
Court of Appeals**
for the Ninth Circuit

R. N. B. CONVERSE, Doing Business as Converse
Trucking Service, and CHESTER A. BOYLE,

Appellants,

vs.

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Oregon**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

KOERNER, YOUNG, McCOLLOCH & DEZEN-
DORF,

JOHN GORDON GEARIN,

OGLESBY H. YOUNG,

800 Pacific Building,

Portland 4, Oregon,

For Appellants.

R. B. MAXWELL,

B. J. GODDARD,

538 Main Street,

Klamath Falls, Oregon,

For Appellee.

In the United States District Court for the
District of Oregon

Civil No. 7493

CONSOLIDATED FREIGHTWAYS, INC., a Corporation,

Plaintiff,

vs.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES, a Corporation;
LUISOTTI BROTHERS, a Partnership; and
CHESTER A. BOYLE,

Defendants.

PETITION FOR REMOVAL

Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, for the purpose of presenting this petition, show that heretofore and on or about the 23rd day of April, 1954, Consolidated Freightways, Inc., a corporation, as plaintiff, brought this action against said defendants in the Circuit Court of the State of Oregon for the County of Klamath.

Defendants, and each of them, at the time of the commencement of said action, were and now are citizens and residents of the State of California and non-residents of the State of Washington. Plaintiff, Consolidated Freightways, Inc., a corporation, at the

time of the commencement of said action was and now is a corporation created under and existing under and by virtue of the laws of the State of Washington and at all of said times was and now is a citizen and resident of that state and a non-resident of the State of California.

This action is one of a civil nature in which there is a controversy between citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

Attached hereto as Exhibits "A" and "B," respectively, are copies of summons and complaint served on Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle in said action in said Circuit Court.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Defendants, Converse Trucking Co.,
Also Known as Converse Trucking Service, a
Corporation; Sacramento Freight Lines, a Cor-
poration, and Chester A. Boyle.

Duly Verified.

EXHIBIT "A"

In the Circuit Court of the State of Oregon
for the County of Klamath

CONSOLIDATED FREIGHTWAYS, INC., a Corporation,
Plaintiff,

vs.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES, a Corporation;
LUISOTTI BROTHERS, a Partnership, and CHESTER A. BOYLE,
Defendants.

SUMMONS

To Converse Trucking Co., Also Known as Converse
Trucking Service, a Corp.; Sacramento Freight
Lines, a Corp.; Luisotti Brothers, a Partnership,
and Chester A. Boyle, Defendants.

In the Name of the State of Oregon:

You are hereby required to appear and answer the complaint filed against you in the above-entitled cause within ten days from the date of service of this summons upon you, if served within this county; or if served within any other county of this state, then within twenty days from the date of the service of this summons upon you; or if served outside the State of Oregon but within the United States, then within four weeks from the date of the service of this summons upon you; or if served outside the United States, then within six weeks from the date of the service of this summons upon you; and if you fail so to answer, for want thereof, the plaintiff will take judgment against you, and each of you, in the sum of \$14,000.00, together with plaintiff's costs and

disbursements, as prayed for in Plaintiff's complaint, a true copy of which is herewith served upon you.

FARRENS & MAXWELL,

By R. B. MAXWELL,

Attorneys for Plaintiff. Post Office Address: 538
Main Street, Klamath Falls, Oregon.

State of Oregon,

County of Klamath—ss.

I, R. B. Maxwell, one of Plaintiffs Attorneys, do hereby certify that I have prepared the foregoing copy of Summons and have carefully compared the same with the original thereof; and that it is a correct transcript therefrom and of the whole thereof.

Klamath Falls, Oregon, dated this 21st day of April, 1954.

/s/ R. B. MAXWELL,

Attorney for Plaintiff.

EXHIBIT "B"

In the Circuit Court of the State of Oregon
for Klamath County

Law No. . . .

CONSOLIDATED FREIGHTWAYS, INC., a Corporation,

Plaintiff,

vs.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES, a Corporation;
LUISOTTI BROTHERS, a Partnership, and
CHESTER A. BOYLE,
Defendants.

COMPLAINT

Plaintiff, for cause of action against defendants, alleges:

I.

At all times mentioned herein plaintiff was and is a corporation organized and existing under the laws of the State of Washington, but qualified to do and doing business in the State of Oregon, and engaged in the general transportation of property by motor vehicle in intrastate and interstate commerce.

II.

Defendants, Converse Trucking Co., also known as Converse Trucking Service, is a corporation engaged generally in the transportation of property by motor vehicle in interstate commerce; Sacramento Freight Lines is a corporation engaged in the transportation of property by motor vehicle; Luisotti Brothers are a partnership engaged generally in the trucking business.

III.

That on or about the 14th day of April, 1954, the said defendants, Converse Trucking Co., also known as Converse Trucking Service; Sacramento Freight Lines and Luisotti Brothers were operating a certain Peterbilt Tractor bearing California license No. BEX 15107 and owned by the said Luisotti Brothers, and a Trailmobile semi-trailer bearing an Interstate Commerce Commission Certificate No. MC 57974, which semi-trailer was owned by the Sacramento Freight Lines and which vehicles were being operated under the Interstate Commerce Commission authority of Converse Trucking Co., also known as Converse

Trucking Service, by and through Chester A. Boyle, an individual, the driver and the agent, employee and servant of said other-named defendants, in a southerly direction on U. S. Highway 97 at a point some five or six miles south of Klamath Falls, Oregon. At said time and place plaintiff was operating a certain 1949 Freightliner, 6-wheel, Cab-over-truck, and a 1948 Freightliner, 6-wheel trailer van, both loaded with produce, in a northerly direction along said highway. That at a point where said highway overpasses the main line of the Southern Pacific railroad a collision occurred between said vehicles.

IV.

Defendants, and each of them, were negligent in the operation of said vehicles in that:

1. They failed to keep any or a proper lookout;
2. They failed to keep their said vehicles under any or proper control;
3. They operated said vehicles at a speed greater than was reasonable or prudent under the circumstances then and there existing;
4. They failed to operate their said vehicles in their righthand half of the main traveled portion of the highway altho said portion of said highway was unobstructed and was available for their use;
5. They operated their said vehicles in more than one lane of a two-lane highway;
6. They allowed their said vehicles to cross the centerline of said highway and encroached upon the lefthand half thereof when the same was occupied by the vehicles of plaintiff;

7. They failed to yield the right-of-way to the vehicles of plaintiff.

V.

The negligence of defendants, as hereinabove set out, was the direct and proximate cause of the collision hereinabove mentioned.

VI.

As a direct and proximate result of the collision hereinabove mentioned, the above-mentioned truck of plaintiff was damaged and decreased in value in the amount of \$8,000.00; the above-mentioned trailer of plaintiff was damaged and decreased in value in the amount of \$2,500.00; the cargo carried upon said vehicles was damaged and decreased in value in the amount of \$1,500.00; plaintiff reasonably incurred necessary expenses in connection with said collision in the amount of \$1,000.00, and plaintiff will be deprived of the use of said vehicles for ten days to plaintiff's damage in the sum of \$1,000.00, all to plaintiff's damage in the total sum of \$14,000.00.

Wherefore, Plaintiff prays for judgment against defendants, and each of them, in the sum of \$14,000.00, together with plaintiff's costs and disbursements herein incurred.

Dated this 21st day of April, 1954.

FARRENS & MAXWELL,

By /s/ R. B. MAXWELL,

Attorneys for Plaintiff.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

BOND

Know All Men by These Presents that Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, as principals, and Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto Consolidated Freightways, Inc., a corporation, in the penal sum of \$500.00 lawful money of the United States for the payment of which sum well and truly to be made unto the said Consolidated Freightways, Inc., we bind ourselves, our successors and assigns, jointly and severally by these presents.

This bond is upon the condition nevertheless that

Whereas said Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, the principal obligors herein, and defendants in the above-entitled court and cause, have filed their petition therein for the removal of said cause thereto from the Circuit Court of the State of Oregon for the County of Klamath,

Now, Therefore, if said Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle shall pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the case was not removable, or was improperly removed, then this obligation shall be null and void, otherwise to remain in full force and effect.

In Witness Whereof, said Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle, as principals, have caused this instrument to be executed by one of their attorneys and Hartford Accident and Indemnity Company as surety, has caused this instrument to be executed and its seal attached this 13th day of May, 1954.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

By /s/ JOHN L. BOYD,
Resident Agent.

Countersign:

By /s/ JOHN L. BOYD,
Attorney-in-Fact.

CONVERSE TRUCKING CO., Also Known as
CONVERSE TRUCKING SERVICE, a Corporation;
SACRAMENTO FREIGHT LINES,
a Corporation, and CHESTER A. BOYLE,

By /s/ OGLESBY H. YOUNG,
One of Their Attorneys.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

NOTICE

To Consolidated Freightways, Inc., a Corporation,
Plaintiff, and to Farrens & Maxwell, Your Attorneys:

You and Each of You please take notice that de-

fendants Converse Trucking Co., also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle have filed in the above-entitled court, a petition and bond for removal of this cause from the Circuit Court of the State of Oregon for the County of Klamath, to the United States District Court for the District of Oregon.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Defendants, Converse Trucking Co.,
also known as Converse Trucking Service, a corporation; Sacramento Freight Lines, a corporation, and Chester A. Boyle.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

INTERROGATORIES SUBMITTED TO PLAINTIFF
BY DEFENDANT CONVERSE
TRUCKING SERVICE

1. State the names and addresses of all persons known by plaintiff or its attorneys to have any knowledge of any material fact in connection with the accident of April 14, 1954, which forms the subject matter of plaintiff's complaint.

2. Have any claims of plaintiff or portions of such claims been paid by any insurance carrier by way of loan receipt or otherwise?

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant,
Converse Trucking Service.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS CONVERSE
TRUCKING SERVICE, IMPEADED AS
CONVERSE TRUCKING CO.; SACRA-
MENTO FREIGHT LINES AND CHESTER
A. BOYLE

First Defense

The complaint fails to state a claim against these answering defendants, or any of them, upon which relief can be granted.

Second Defense

These answering defendants deny each and every allegation contained in plaintiff's complaint and the whole thereof, generally and specifically, except they admit:

I.

At all times mentioned in plaintiff's complaint, plaintiff was a Washington corporation qualified to do business in the State of Oregon and is engaged in the general transportation of property by motor vehicle. Converse Trucking Service is a California corporation. Sacramento Freight Lines is a corporation, and both of said defendants are engaged in the general transportation of property by motor vehicle.

II.

On or about the 14th day of April, 1954, defendant Converse Trucking Service by its employee Chester A. Boyle, were operating a certain Peterbilt tractor owned by Luisotti Brothers and pulling a certain Trailmobile trailer owned by Sacramento Freight Lines. On said date said equipment was travelling southerly on Highway No. 97 in Klamath County, Oregon, approximately five miles south of Klamath Falls, at which time and place a certain truck and trailer owned and operated by plaintiff was proceeding northerly upon said highway.

III.

These answering defendants admit that a collision occurred between said vehicles and that the truck and trailer of plaintiff was damaged to some extent.

Third Defense

Plaintiff was guilty of contributory negligence constituting the sole or proximate cause of plaintiff's damage.

Fourth Defense

The accident and plaintiff's damages were unavoidable insofar as these answering defendants are concerned.

Wherefore having fully answered plaintiff's complaint, these answering defendants pray that plaintiff take nothing thereby.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

Attorneys for Defendants, Converse Trucking Service, Sacramento Freight Lines and Chester A. Boyle.

Affidavit of Service by mail attached.

[Endorsed]: Filed May 18, 1954.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Comes now plaintiff and demands a trial by jury of all issues so triable.

Dated this 19th day of May, 1954.

FARRENS & MAXWELL,

By /s/ R. B. MAXWELL,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1954.

[Title of District Court and Cause.]

MOTION FOR TRIAL AND HEARING OF ALL
PRELIMINARY MATTERS AT KLAMATH
FALLS, OREGON

Comes now plaintiff and requests and moves the Court for an order directing that trial of the above-entitled matter and hearing upon all preliminary matters, including pre-trial proceedings, be held at Klamath Falls, Oregon, at such time or times as may be designated by the Court for the reason and upon the grounds that the accident and collision out of which this action arose occurred in Klamath County, Oregon, and that many witnesses will be called at the trial who are residents of Klamath County, Oregon.

Dated this 19th day of May, 1954.

FARRENS & MAXWELL,

By /s/ R. B. MAXWELL,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 22, 1954.

[Title of District Court and Cause.]

ORDER

Upon motion of plaintiff, it is

Ordered, that trial of the within action and all preliminary matters, including pre-trial proceedings,

be transferred to and heard at sessions of this Court at Klamath Falls, Oregon, at a date or dates to be later set by this Court.

Dated this 24th day of May, 1954.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed May 24, 1954.

[Title of District Court and Cause.]

MINUTES OF AUGUST 4, 1955

Now at this day come the plaintiff by Mr. Richard B. Maxwell, of counsel, and the defendants by Mr. John Gordon Gearin, of counsel. Now come the following-named jurors to try the issues joined, to wit: Gilbert Elder, William H. Zehr, Robert D. Adams, Jr., Donald Lester McGee, Walter A. McCaw, Jo Anna Taylor, R. P. Lien, Vincent R. Lawler, Frank Griffith, George E. Stevenson, Robert B. Norris and Glenn Haskins, twelve good and lawful men and women of this District, who, being accepted by the parties hereto, are duly impaneled and sworn.

The said jury having heard the statements of counsel and the evidence adduced, the trial of this cause is continued to tomorrow, Friday, August 5, 1955, at nine-forty-five o'clock a.m.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above-entitled Court at Klamath Falls, Oregon, on Wednesday, August 3, 1955. Plaintiff appeared by R. B. Maxwell of its attorneys and defendants appeared by John Gordon Gearin of their attorneys. The parties with the approval of the Court agree to the following:

Statement of Facts

I.

At all times mentioned in plaintiff's complaint, plaintiff was a Washington corporation; defendant Converse, a California citizen; Sacramento Freight Lines, a corporation, and all of said parties being duly authorized to do business in the State of Oregon in the transportation of commodities as motor carriers.

II.

On or about the 14th day of April, 1954, on Highway 97, Klamath County, Oregon, at a point approximately five miles south of Klamath Falls, a collision occurred between a truck and trailer owned and operated by plaintiff, which was proceeding north-erly upon said highway, and a certain Peterbilt Tractor owned by Luisotti Brothers (citizens and residents of California) and a certain Trailmobile trailer owned by Sacramento Freight Lines. Said tractor and trailer were operated by defendant Converse Trucking Service by its employee Chester A.

Boyle (a citizen and resident of the State of California).

III.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

IV.

As a proximate result of said collision the truck, trailer and freight of plaintiff was damaged and depreciated in the amount of \$10,160.45, and the equipment and the tractor of defendant Luisotti Brothers was damaged in the amount of \$6,717.70, and the trailer of defendant Sacramento Freight Lines was damaged in the amount of \$3,766.16.

Plaintiff's Contentions

I.

Plaintiff contends that defendants in the operation of said tractor and trailer were guilty of negligence proximately causing said accident in that:

1. They failed to keep any or a proper lookout;
2. They failed to keep their said vehicles under any or proper control;
3. They operated said vehicles at a speed greater than was reasonable or prudent under the circumstances then and there existing;
4. They failed to operate their said vehicles in their right-hand half of the main traveled portion of the highway altho said portion of said highway was unobstructed and was available for their use;

5. They operated their said vehicles in more than one lane of a two-lane highway;

6. They allowed their said vehicles to cross the centerline of said highway and encroached upon the left-hand half thereof when the same was occupied by the vehicles of plaintiff;

7. They failed to yield the right-of-way to the vehicles of plaintiff.

* * *

The foregoing contentions of plaintiff, and each of them, are denied by defendants.

Defendants' Contentions

I.

Defendants contend that plaintiff in the operation of its truck and trailer was guilty of negligence proximately causing said accident, consisting of the following:

1. It failed to keep any or a proper lookout;

2. It failed to keep its said vehicles under any or proper control;

3. It operated said vehicles at a speed greater than was reasonable or prudent under the circumstances then and there existing;

4. It failed to operate its said vehicles in its right-hand half of the main traveled portion of the highway altho said portion of said highway was unobstructed and was available for its use;

5. It operated its said vehicles in more than one lane of a two-lane highway ;

6. It allowed its said vehicles to cross the center-line of said highway and encroached upon the left-hand half thereof when the same was occupied by the vehicles of defendants ;

7. It failed to yield the right-of-way to the vehicles of defendants.

* * *

The foregoing contentions of defendants, and each of them, are denied by plaintiff.

Issues to Be Determined

1. Were defendants guilty of negligence in any particular as charged by plaintiff, and if so, was such negligence a proximate cause of plaintiff's damage ?

2. Was the plaintiff guilty of negligence in one or more of the particulars charged by defendants, and if so, was such negligence a proximate cause of defendants' damage ?

Physical Exhibits

Certain exhibits have been identified; it being understood that further identification of any exhibit will not be required, and that objections may be interposed to the introduction of evidence of any exhibit only on the grounds of immateriality and irrelevancy.

Plaintiff's Exhibits

1. Depositions of Joe E. Cornelson, Albert W. Cornelson and Chester A. Boyle.
2. Photographs.
3. Maps.
4. Reserved.
5. Officer's notebook.
6. Sealed exhibit for impeachment purposes only.

Defendants' Exhibits

1. Depositions of Joe E. Cornelson, Albert W. Cornelson and Chester A. Boyle.
2. Maps.
3. Photographs.
4. Reserved.
5. Sealed exhibit for impeachment purposes only.

Jury Trial

Timely demand was made for trial by jury.

Based upon the foregoing, the Court orders the cause set for trial, and it is further ordered that the foregoing pre-trial order shall not be amended except by consent of the parties or to prevent manifest injustice, and it is further ordered that the pre-trial order supersedes all pleadings.

Dated at Klamath Falls, Oregon, this 4th day of August, 1955.

/s/ JAMES ALGER FEE,
Judge.

Approved:

/s/ R. B. MAXWELL,

Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,

Of Attorneys for Defendants.

[Endorsed]: Filed August 4, 1955.

[Title of District Court and Cause.]

STIPULATION

It is stipulated and agreed between the parties, through their respective attorneys of record, that no objection will be raised and no error claimed by reason of the use of any deposition of Joe E. Cornelson, Albert W. Cornelson or Chester A. Boyle, regardless of whether such deposition was taken in connection with the within cause or in connection with some other action.

Dated this 5th day of August, 1955.

/s/ R. B. MAXWELL,

Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,

Of Attorneys for Defendants.

[Endorsed]: Filed August 5, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impanelled and sworn to try the above-entitled case and cause, do find our verdict in favor of plaintiff and against defendants Converse and Boyle and assess plaintiff's damages at \$10,160.45.

Dated at Klamath Falls, Oregon, this 5th day of August, 1955.

/s/ ROBERT S. ADAMS, JR.,
Foreman.

[Endorsed]: Filed August 5, 1955.

In the United States District Court
for the District of Oregon
Civil No. 7493

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,
Plaintiff,

vs.

R. N. B. CONVERSE dba CONVERSE TRUCK-
ING SERVICE, a Corporation; SACRA-
MENTO FREIGHT LINES, a Corporation;
LOUISOTTI BROTHERS, a Partnership;
and CHESTER A. BOYLE,
Defendants.

JUDGMENT

This cause came on regularly for trial before the undersigned Judge, sitting with a jury, in Klamath

Falls, Oregon, on Thursday, August 4, 1955. Plaintiff appeared by R. B. Maxwell, one of its attorneys, and defendants appeared by John Gordon Gearin, one of their attorneys. A jury was duly impanelled and sworn, and testimony was introduced on behalf of the plaintiff and said trial was continued until the following day, when testimony was introduced by and on behalf of the defendants. At the conclusion of all the testimony, a motion for dismissal of the action against Sacramento Freight Lines, a corporation, and Louisotti Brothers, a partnership, was allowed by the Court. Thereafter, the cause was argued to the jury which was instructed by the Court as to the law and, on said same day, retired to consider its verdict and, on said same day, returned into court its verdict reading as follows (caption omitted):

“We, the jury, duly impanelled and sworn to try the above-entitled cause, do find our verdict in favor of plaintiff and against defendants R.N.B. Converse and Chester A. Boyle, and assess plaintiff’s damages at \$10,160.45. Dated at Klamath Falls, Oregon, this 5th day of August, 1955. (Signed) Robert Adams, Foreman.”

Said verdict was duly accepted and filed, and judgment entered thereon. Now, therefore, based upon said verdict, it is

Ordered and Adjudged that plaintiff have judgment against defendants R. N. B. Converse and Chester A. Boyle, and each of them, in the sum of

\$10,160.45, and for its costs and disbursements herein taxed at \$.

Dated this 5th day of August, 1955.

/s/ JAMES ALGER FEE,
United States Circuit Judge Sitting by Assignment
to This District.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

BILL OF COSTS

Bill of Costs claimed by Consolidated Freightways, Inc., a Corporation, plaintiff in the above-entitled cause, namely:

Fee of the Clerk of the Circuit Court	
filing of complaint	\$ 13.60
Fee of the Sheriff for service of	
Summons and Complaint.	12.43

Witness fees as follows:

Hugh Brown, attendance fee, 2	
days, Aug. 4th & 5th, @ \$4.00 ..	\$ 8.00
Mileage 600 miles @ 7c, Round-	
trip from Portland, Oregon. . . .	43.00 51.00

M. Lange, attendance fee, 1 day,	
August 5th	4.00
Mileage 550 miles @ 7c from Eu-	
gene, Oregon	38.50 42.50

20.92	24.92
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Albert W. Cornellson, 2 days,		
Aug. 4th and 5th, @ \$4.00....	8.00	
Mileage, 100 miles, @ 7c.....	7.00	15.00
		<hr/>
Joe Cornellson, 1 day, Aug. 5th.....	4.00	
Mileage 100 miles @ 7c.....	7.00	11.00
		<hr/>
State Police Officer Winningham, 1		
day	4.00	4.00
State Police Officer Paxton, 1 day...	4.00	4.00
		<hr/>
Attorney's fee		20.00
		<hr/>
Total costs taxed at.....		<u>\$104.95</u>

Dated at Klamath Falls, Oregon, this 12th day of August, 1955.

/s/ R. B. MAXWELL,

Of Attorneys for Plaintiff.

State of Oregon,

County of Klamath—ss.

I, R. B. Maxwell, being first duly sworn, say:

That I am one of the attorneys for the plaintiff in the within-entitled action; that I have knowledge of the facts, that each item is correct and has been necessarily incurred in the within case and that services for which fees were charged have been actually and necessarily performed.

/s/ R. B. MAXWELL.

Subscribed and sworn to before me this 12th day of August, 1955.

[Seal] /s/ F. M. CARLSON,
Notary Public for Oregon.

For canceled material and figures appearing in italics.

R. De MOTT,
Clerk.

By /s/ F. L. BUCK,
Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

NOTICE

To: John Gordon Gearin, Attorney for Converse Trucking Service and Chester A. Boyle.

Please take notice that on Monday, August 22, 1955, plaintiff will apply to the Clerk of the United States District Court, District of Oregon, for taxation of costs in the within action.

Dated this 17th day of August, 1955.

MAXWELL & GODDARD,

By /s/ R. B. MAXWELL,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO COST BILL

Come now defendants R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle and object to the allowance to plaintiff of any attendance fee or mileage to Hugh Brown on the ground and for the reason that said Hugh Brown did not testify at trial. Defendants further object to the allowance of mileage to witnesses Albert W. Cornellson and Joe Cornellson in excess of the distance between the place of trial, i.e., Klamath Falls, and the Oregon-California boundary on the ground and for the reason that mileage is not allowable for travel outside the district in which the case is tried.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendants R. N. B. Converse, dba
Converse Trucking Service, and Chester A.
Boyle.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiff Above Named and to Your Attorneys
of Record:

You and Each of You please take notice that R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle hereby appeal from that certain judgment entered in the above-entitled cause on August 5, 1955, in favor of plaintiff and against these appealing defendants and do appeal from the whole and each and every part thereof.

Dated this 30th day of August, 1955.

R. N. B. CONVERSE, dba CONVERSE TRUCK-
ING SERVICE, and CHESTER A. BOYLE,

By /s/ JOHN GORDON GEARIN,
One of Their Attorneys.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice is hereby given that R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle, defendants above named hereby appeal to the Court of Appeals for the Ninth Circuit from the final

judgment entered against them in this action on August 5, 1955.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JOHN GORDON GEARIN,

Attorneys for Appellants R. N. B. Converse, dba
Converse Trucking Service, and Chester A.
Boyle.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 6, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents that we, R. N. B. Converse, dba Converse Trucking Service, a corporation, and Chester A. Boyle, as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Consolidated Freightways, Inc., a corporation, in the full and just sum of Eleven Thousand Five Hundred Dollars (\$11,500.00) to be paid to the said Consolidated Freightways, Inc., its successors and assigns, to which payment well and truly to be made we bind ourselves, our personal representatives, heirs, successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of September in the year of our Lord One Thousand Nine Hundred Fifty-Five.

Whereas, lately in the United States District Court for the District of Oregon in a cause pending in said Court between Consolidated Freightways, Inc., a corporation, and R. N. B. Converse, dba Converse Trucking Service, a corporation, and Chester A. Boyle, defendants, a judgment was rendered against said defendants, and the said defendants having filed in said court an Amended Notice of Appeal to reverse the judgment in the aforesaid cause, in which notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if said R. N. B. Converse, dba Converse Trucking Service and Chester A. Boyle shall prosecute their appeal to effect and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is delayed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and effect.

R. N. B. CONVERSE, dba CONVERSE TRUCKING SERVICE, a Corporation, and CHESTER A. BOYLE,

By /s/ JOHN GORDON GEARIN,
Of Their Attorneys,
Principal.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
A Corporation,

By /s/ ROBERT B. CUMMING,
Attorney in Fact.

Countersigned:

By /s/ ROBERT B. CUMMING,
Surety.

ORDER

The foregoing bond is hereby approved and is to stand as a supersedeas until the final determination of the appeal.

Dated this 30th day of September, 1955.

/s/ JAMES ALGER FEE,
Judge.

Consent is hereby given to entry of the foregoing order.

/s/ B. J. GODDARD,
Of Attorneys for Plaintiff.

[Endorsed]: Filed October 3, 1955.

United States District Court
District of Oregon

Civil No. 7493

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,

Plaintiff,

vs.

R. N. B. CONVERSE, Doing Business as CON-
VERSE TRUCKING SERVICE, SACRA-
MENTO FREIGHT LINES, a Corporation,
and LUISOTTI BROTHERS, a Partnership,
and CHESTER A. BOYLE,

Defendants.

August 4, 1955

Before: Honorable James Alger Fee, Judge of the
United States Court of Appeals, Ninth
Circuit, sitting by assignment as Judge of
the above-entitled court.

Appearances:

MAXWELL & GODDARD,

Attorneys for Plaintiff.

KOERNER, YOUNG, McCOLLOCH & DE-
ZENDORF, By

JOHN GORDON GEARIN,

Attorneys for Defendants.

TRANSCRIPT OF PROCEEDINGS

Mr. Gearin: There is one thing. I just learned something that I have mentioned briefly to Mr. Maxwell. There is a question about the corporate capacity of Converse Trucking Company. I don't believe the corporation papers have been finished. We will ask at a later time to substitute R. N. B. Converse, d.b.a. Converse Trucking Company as and for the Converse Trucking Company, a corporation.

Mr. Maxwell: I have no objection to that, your Honor, depending upon the facts. We have been both following the assumption that the defendant was a corporation.

Mr. Gearin: We will discuss that at the first recess. If there is an amendment necessary we will stipulate that it revert back to the filing of the complaint or to the filing of the pre-trial order.

Mr. Maxwell: That is satisfactory with me, your Honor.

The Court: I will sign the pre-trial order, then, with that understanding.

(Thereupon a jury was duly and regularly impaneled and sworn, counsel for the respective parties made opening statement to the jury, and thereupon the following proceedings were had): [2*]

JOE E. CORNELSON

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Your name is Joe E. Cornelson?

A. Yes.

Q. Where do you live, Mr. Cornelson?

A. Huntington Park, California.

Q. What is your occupation?

A. Truck driver.

Q. On the 14th day of April, 1954, by whom were you employed?

A. Consolidated Freightways.

Q. Were you the driver of the Consolidated truck that was involved in the collision that is the subject of this case?

A. Yes.

Q. What kind of equipment were you operating, Mr. Cornelson?

A. It is what is known as truck and trailer.

Q. Can you describe briefly what that is?

A. Well, it is a truck that pulls a full trailer.

Q. It is a full truck and a full trailer?

A. Yes, that is correct.

Q. When did you start on the trip?

A. As I remember, it was approximately midnight of the 12th of April from Los Angeles. [3]

Q. Where were you en route to at the time?

A. Portland, Oregon.

(Testimony of Joe E. Cornelson.)

Q. Calling your attention to the 14th day of April, 1954, Mr. Cornelson, will you just describe what happened say from about daylight on that morning?

A. Well, at approximately daylight I was coming off the Hebron Mountain. I can remember seeing the sun shining and seeing patches of fog down below, and I can remember passing through patches of fog until I arrived at Dorris, at which I had to stop at the inspection station due to the fact I had on agricultural products. Then from there up and proceeding to the top of a little hill outside of Dorris there was some ice forming and being a bother, naturally, on my truck, so I stopped at the top of the hill and removed the ice. That is the last clear memory that I have on that day.

Q. You don't remember any of the details of driving from a little hill outside of Dorris to the scene of the accident?

A. No.

Q. Do you recall anything about the accident itself?

A. No.

Q. When is your next memory, Mr. Cornelson?

A. Well, I was told it was on the afternoon of the third day, but I wouldn't know about that.

Q. Where did you recover your memory? [4]

A. In the Klamath Falls Hospital.

Q. Was anyone with you on this trip?

A. My brother Albert.

Q. Where was he the last time you remember?

A. He was sitting in the off seat.

Q. That is in the cab on your side?

(Testimony of Joe E. Cornelson.)

A. Yes, on the opposite side from the driver.

Q. When did he take that position?

A. At the Dorris inspection station.

Mr. Maxwell: You may cross-examine.

Cross-Examination

By Mr. Gearin:

Q. Mr. Cornelson, had you been talking with your brother after you left Dorris?

A. Yes, I can remember talking to him at Dorris.

Q. I mean after you got in the tractor.

A. Yes.

Q. You were talking as you were proceeding north? A. Yes.

Q. You have an action pending against Converse and others for personal injuries in the California court, don't you? A. I do.

Mr. Gearin: I have no further questions.

(Witness excused.) [5]

ALBERT CORNELSON

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Where do you live, Mr. Cornelson?

A. Long Beach, California.

(Testimony of Albert Cornelson.)

Q. What is your occupation?

A. Truck driver.

Q. On April 14th, 1954, by whom were you employed?

A. Consolidated Freightways.

Q. On the 14th day of April where were you?

A. Riding in that vehicle that was involved in the accident.

Q. Had you been with your brother on the whole trip, Mr. Cornelson?

A. Yes.

Q. When did you get into the driving compartment of the vehicle?

A. That was at Dorris, at the inspection station.

Q. Where were you located in the vehicle from then on until the accident occurred?

A. In that off seat of the driver in the cab.

Q. Can you describe the weather and the conditions of the highway between Dorris and the scene of the accident?

A. The weather was patchy fog, and where it wasn't fog [6] it was as clear as it is today; the sun was shining. You had a patch of fog and you ran out of that and it would be bright daylight. The road, as I remember it, was dry, the surface.

Q. Do you recall what the condition of the lights on your vehicle were?

A. They were all burning, headlights and clearance lights.

Q. Was that true all the time, say, from Dorris up to the time of the accident?

(Testimony of Albert Cornelson.)

A. Yes. They were on to run in the fog and we kept them on continuously.

Q. Were those lights burning at the time of the collision? A. Yes.

Q. Can you state to the jury the approximate speed of your vehicle as you came up to this overpass?

A. I would say when we approached the overpass we hit a patch of fog, and Joe immediately began to slow down. By the time we reached the top of the overpass we were approximately going 30 miles an hour.

Q. What would you say your speed was as you came up to the overpass?

A. About 40 miles an hour; not over that.

Q. Now Mr. Cornelson, just describe what you remember of the events leading up to the accident and the collision itself. [7]

A. I was sitting there not paying too much attention to the driving, relaxed, and as we approached the overpass we hit a patch of fog, and as we neared the summit I remember seeing a set of headlights, and my impression was——

Mr. Gearin: We would object to his impression, your Honor.

Q. (By Mr. Maxwell): Just state what you saw.

A. I saw a set of headlights, and I made a statement to my brother, "What is he doing on the

(Testimony of Albert Cornelson.)

wrong side of the road? The so-and-so is going to hit us." And at that time he did.

Q. Were you able to see at that time the center line in the highway? A. Yes.

Q. How many lanes are there there?

A. At that time there were three.

Q. Can you state the position of the headlights which you saw in relation to the center line?

A. The headlights that I saw were astraddle of the dividing line.

Q. Was the collision with the vehicle bearing those headlights? A. Yes.

Q. From the time you saw those headlights, Mr. Cornelson, was there any change in the course of your vehicle? A. Yes.

Q. What was that? [8]

A. At the time that I spotted the headlights I remember my brother swerving the vehicle to the right of the road as far as possible.

Q. Can you give us any estimate of the time that elapsed from the time you saw the headlights to the time the collision occurred?

A. It couldn't have been over two or three seconds.

Q. What happened to you in the collision, Mr. Cornelson?

A. I was thrown out, thrown out of the front of the vehicle.

Q. Were you able to be around the scene of the collision afterwards? A. Yes.

Q. What did you do?

(Testimony of Albert Cornelson.)

A. Immediately upon falling out of the vehicle I noticed my brother lying on the pavement. He had fell out with me. About that time I heard the noise of an approaching truck. My first thought was to stop the approaching vehicle to keep him from running into the wreck that had just happened. So I flagged him down and flagged the following truck, which was a West Coast, and proceeded to get some fusees from him, and moved on down the hill and flagged a Converse rig down, and I asked the Converse driver if he would go down the hill and place some more fusees; that I wanted to get back up on the hill and check up on my brother and also check the south side of the overpass to see how the other driver [9] did, and if there had been fusees placed there.

Q. When you described you heard a vehicle coming, that would be from the north?

A. Right.

Q. From Klamath Falls? A. Right.

Q. And the vehicles that you flagged down and the fusees that you put out were to the north?

A. Yes.

Q. All right. Then what did you do after that?

A. After I had gone back up the hill—I seen my brother was hurt. About the next thing I remember is this Converse driver, a fellow by the name of Reynolds, and he asked me if I had seen any——

Mr. Gearin: We object to any conversation with Mr. Reynolds, your Honor, as being hearsay.

(Testimony of Albert Cornelson.)

Mr. Maxwell: Don't say anything about any conversation.

A. I see.

Q. Were you there, Mr. Cornelson, when the state officers arrived? A. Yes.

Q. Did you afterwards leave the scene of the accident? A. Yes.

Q. Whom did you leave with?

A. Mr. Boyle. [10]

Q. Mr. Boyle was the driver of the Converse equipment? A. Yes.

Q. Did you have any conversation with Mr. Boyle about how the accident happened?

A. Not when we left the scene of the accident, no.

Q. Did you at any time have any conversation with Mr. Boyle about how the accident happened?

A. Yes.

Q. And what did he say about the accident?

A. I remember asking him what he was doing on our side of the road, and he admitted driving with his head out the window and he was on the white line, the dividing line of the highway.

Q. When did that conversation occur?

A. Beg pardon?

Q. When did that conversation occur?

A. Approximately five or ten minutes after the accident itself happened.

Q. Before you had left the scene of the accident?

A. That is right.

(Testimony of Albert Cornelson.)

Q. Did you go back to the scene of the accident later that day?

A. Approximately ten o'clock that morning.

Q. Did you examine the situation there?

A. Yes, I looked it over. [11]

Q. Did you observe any marks on the highway or the overpass?

A. Yes, there was a gouge mark which would be to the east of the center line of the highway, and that gouge mark continued from where it started to where it stopped, and where it came to a stop was where the Converse rig came to rest.

Q. Can you say at what part of the Converse rig that gouge mark stopped?

A. Yes, at the rear axle housing of the Converse tractor.

Q. At the rear axle. What was the condition of the rear axle?

A. Both left wheels were knocked completely off of it and the axle housing was dragging on the ground.

Q. That would be the dual wheels?

A. Yes.

Q. Can you state to the best of your recollection what would be the distance from the broken end of the axle housing to the outside of the two dual wheels?

A. Approximately two and a half feet.

Q. Did you observe any other marks at the scene?

(Testimony of Albert Cornelson.)

A. I noticed scuff marks from the tires rubbing on the side of the curbing that were made by our vehicle.

Mr. Gearin: We object to that last remark, your Honor, and ask that it be stricken and the jury instructed to disregard it.

The Court: Overruled.

Q. (By Mr. Maxwell): Had your vehicle been moved at the [12] time you got there, Mr. Cornelson? I mean at ten that morning.

A. That I don't remember.

Q. Do you know whether the other vehicle had been moved? A. I don't believe so.

Q. What other marks were there, if any, on the bridge itself, the overpass, Mr. Cornelson?

A. As I mentioned, these scuff marks of the tires, and there was also an imprint left by one of the tires on the Freightways rig upon the top railing of the bridge.

Q. What do you mean by "imprint"?

A. It was an imprint left—it was the letters that Freightways uses to identify their tires with. There was four letters, F-L-E-E and part of a T, for distinction.

Q. What was the condition of the railing on the bridge? A. It was broken in places.

Q. Did you examine the tires on your equipment? A. Yes.

Q. What was their condition?

A. They had fresh scuff marks on them.

Mr. Maxwell: You may cross-examine.

(Testimony of Albert Cornelson.)

Cross-Examination

By Mr. Gearin:

Q. Mr. Cornelson, you were seated in the right side of the cab? [13] A. That is correct.

Q. That was a Freightliner cab-over?

A. Check.

Q. How wide is that cab?

A. Approximately seven feet.

Q. And the width of your rig was eight feet?

A. Over-all outside dimensions.

Q. You were seated on the extreme right?

A. Check.

Q. And you say when you got onto the bridge there was fog. How thick was the fog? Can you give us any idea?

A. Well, the visibility was limited but you could see approximately 75 to 100 or possibly a little bit more.

Q. Would you say 150 feet?

A. Yes, I believe up to that far.

Q. All right, sir. You talked with Mr. Boyle? That is our driver. A. That is right.

Q. You said he told you he was on the white line?

A. On the dividing line of the highway.

Mr. Gearin: Would you hand the witness, please, Pre-Trial Exhibit No. 1, the deposition of Albert A. Cornelson?

The Clerk: It doesn't seem to be in the file.

(Testimony of Albert Cornelson.)

The Court: Is it stipulated that a copy may be used instead of the original? [14]

Mr. Gearin: Yes, we stipulate.

Mr. Maxwell: So stipulated.

Mr. Gearin: And the other depositions which Mr. Maxwell and I have which may not have been filed.

The Court: All right.

Mr. Maxwell: So stipulated.

Q. (By Mr. Gearin): Will you turn to page 18, please. Now do you recall when your deposition was taken? A. Not the exact date.

Q. Do you recall your deposition being taken on March 28, 1955, in Los Angeles, California?

A. Yes.

Q. I will ask you if at that time you were asked these questions and you gave these answers:

“Q. Later on did you talk to the driver of the other truck? A. Just for a few words.

“Q. Did he identify himself to you?

“A. Yes.

“Q. His name was Mr. Boyle?

“A. Chester A. Boyle.

“Q. Did he tell you anything about how the accident happened?

“A. The only statement he made to me, as I recall, was that ‘I was driving with my head out of the window watching the white line.’ [15]

“Q. Anything else?

“A. That is, to me. That is all I remember he made to me.”

(Testimony of Albert Cornelson.)

Did you so testify? A. Yes.

Q. Now you stated that your speed was approximately 30 miles an hour up on the underpass?

A. At the time of the impact, yes.

Q. I will ask you if at the scene of the accident you had a conversation with Officer Byron D. Winningham, an officer of the State Police.

A. Yes.

Q. I will ask you if at that time you stated to Officer Winningham that you were doing 45 miles an hour? A. Yes.

Mr. Gearin: I have no further questions.

Mr. Maxwell: I have no further questions.

(Witness excused.) [16]

BYRON D. WINNINGHAM

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. You are Officer Byron D. Winningham?

A. Yes.

Mr. Gearin: I will stipulate that any photographs you have may be received in evidence without further identification, and they can be handed directly to the officer.

Mr. Maxwell: I think that was provided in the

(Testimony of Byron D. Winningham.)

pre-trial order, but I should like to have them entered and received at this time, your Honor.

Mr. Gearin: No objection.

The Court: Received.

(A group of photographs was received in evidence as Plaintiff's Exhibit 2.)

Q. (By Mr. Maxwell): Officer Winningham, you have been handed a group of, I believe, eleven photographs. Are you able to recognize the scenes portrayed by those photographs?

A. Yes, sir; I am.

Q. And what do they portray?

A. An accident that I investigated in April, 1954.

Q. That is the accident between the Converse rig and the Consolidated rig on the railroad overpass south of town? [17]

A. Yes, sir.

Q. Are those fair representations of the appearance of the overpass and of the vehicles and their locations following that accident?

A. Yes, sir. They look exactly like it.

Q. Officer, do you recall about what time you got to the scene of the accident?

A. With your permission I would like to refer to my notebook to refresh my recollection.

Q. Certainly. You may do that to refresh your recollection.

Mr. Gearin: We have no objection, Officer.

Mr. Maxwell: Before you do that, I think we sort of skipped a preliminary or two here, Officer.

(Testimony of Byron D. Winningham.)

I guess your name is in the record, but will you state where you live and what your occupation is?

A. My name is Byron D. Winningham, and I am employed by the Oregon State Police here in Klamath Falls.

Q. You were an officer in the Oregon State Police on April 14th, 1954? A. Yes, sir; I was.

Q. Would you go back and tell me what time you arrived at the scene of the accident?

A. According to my notebook on April 14th I arrived at the scene of the accident at 6:35 a.m.

Q. Now officer, you investigated generally the accident? A. Yes, sir. [18]

Q. Did you find any marks on the highway?

A. Yes, sir; I did.

Q. Would you just describe what marks you found and where they were located?

A. In referring to the diagram that I drew at the scene of the accident, I have several large gouge marks connected by a scuff mark that wasn't actually heavy enough to make a deep gouge in the pavement, but it was apparent that a piece of steel——

Mr. Gearin: We are going to object, your Honor, to what was apparent. I think the officer can testify to what he saw and what he found, but the significance, I believe, would be for the jury to determine.

The Court: That is not the rule exactly. He can testify to the conditions that he found and as he saw them at the time, and then after he has stated

(Testimony of Byron D. Winningham.)

the facts of his observation then he may also give his conclusions as to what caused them.

Q. (By Mr. Maxwell): Just state what you saw now, Officer.

A. Would you like at this time to have the measurements and the position of these gouges?

Q. If you can give us the measurements of the gouges, first talking about this scuff mark and then whatever else you saw. [19]

A. The material making the original scuff mark, the first gouge, measured 13 feet 9 inches from the west curb line.

Q. 13 feet nine inches?

A. Yes, sir, from the west curb line of the overpass, it being 12 feet 4 inches from the east curb. That is the first gouge that I observed, the initial gouge in the pavement.

Q. Before going on, Officer, how wide is the pavement between curbs at that point?

A. The distance between the two curb lines is 26 feet.

Q. Thank you.

A. In addition to the gouge marks I observe tire scuff marks along the west side of the curb line measuring 14 feet 9 inches from the initial gouge mark and measuring from the south 169 feet—correction—77 feet 10½ inches from the south end of the overpass along the curb line.

Q. Were you able to trace the gouge marks from

(Testimony of Byron D. Winningham.)

the first one that you have described to any place?
Were you able to trace that gouge?

A. Yes, sir. Standing at the first gouge measured, looking in a southwesterly direction, there were deep gouge marks and, as I said a while ago, a scuffing where some steel had been dragged along on top of the pavement and it followed each gouge line directly up to the rear axle housing of the Converse truck. That is, the south-bound truck.

Q. Did you examine the rear axle housing? [20]

A. Yes, sir; I did.

Q. What was its condition?

A. Well, sir, the two drivers, left rear drivers, were knocked off.

Q. The two left rear drivers. I assume by that you mean the dual tires? A. Yes, sir.

Q. Were they there at the scene of the accident?

A. Yes, sir; they were.

Q. Are they shown in any of the photographs that were handed to you?

A. Yes, sir. This one.

Q. Would you turn over the picture that you are referring to and read the number off the back, Officer. A. Exhibit 2-A.

Q. That does show the drivers to which you refer? A. Yes, sir.

Q. Can you tell us, Officer, how far it was to the rear of the Converse equipment from the first gouge mark? A. 65 feet 2 inches.

Q. All right. Now, Officer, going back, you started to describe the tire marks on the curb, I be-

(Testimony of Byron D. Winningham.)

lieve it was, or did you? A. Yes, sir; I did.

Q. Would you just describe what marks you saw and where they were. [21]

A. Going back to the measurements I gave you before, 77 feet 10½ inches from the south end of the bridge scuff marks went in a northeasterly direction, and they followed along the curb line for several feet—the exact distance I didn't measure—at which time they came up over the curb, and there were two or three little scuff marks in the same direction up to the railing. At the point where they reached the top of the railing they imprinted a four-letter word here, "F-l-e-e-t," which was found to be from the left front wheel of the north-bound Consolidated trailer—correction—the right front wheel.

Q. Officer, can you give us to the best of your ability the distance between the end of the broken axle on the Converse equipment and the outside of the dual wheels before they were broken off?

A. I would say 12 to 14 feet.

Q. I don't think you understood my question, Officer. The distance from the end of the broken axle to the outside of the wheels before they were broken off.

A. Yes, sir. It would be 30 inches, something in that category.

Mr. Maxwell: I believe, if the Court please, it would be helpful in understanding the case if the pictures could be handed to the jury at this time for their examination.

(Testimony of Byron D. Winningham.)

Mr. Gearin: Fine. [22]

The Court: All right.

Mr. Maxwell: I have no further questions of the witness.

Mr. Gearin: May I delay cross-examination, your Honor, until the jurors have had time to see the photographs?

The Court: Yes. While the jury's attention is occupied with something else, the Clerk calls my attention to the fact that these depositions were not taken in this action but were taken in another action, and so therefore I will ask a written stipulation to the effect that they may be used.

Mr. Gearin: Your Honor, the deposition of Joe Cornelson was taken in connection with another action. There was no interrogation of Mr. Cornelson with regard to his testimony on his deposition. The deposition to which I referred, your Honor, was that of Albert Cornelson, which bears the caption of this cause. I can submit a copy to the Court if you would like to see it, your Honor. I have a duplicate original marked as a pre-trial exhibit.

The Court: What led me astray is that they are duplicates.

Mr. Gearin: We will enter into any type of stipulation the Court would desire.

The Court: All right. Put in something so there won't be any question about what we are doing. This seems to be all right, this duplicate original being marked, having been entitled in this action. I think that probably cures [23] it. I would like to

(Testimony of Byron D. Winningham.)

have the record corrected before the close of the case.

Mr. Maxwell: May I ask a couple more questions that I neglected to ask, your Honor?

The Court: Yes.

Q. (By Mr. Maxwell): Officer Winningham, did you have any assistance in your investigation there? A. Yes, sir; I did.

Q. Who was with you?

A. Officer Paxton. He arrived at the scene shortly after I did.

Q. Now, did you observe a center line on the highway there, Officer Winningham?

A. Yes, sir; I did.

Q. Can you tell us from your records the distance that the first gouge mark you have described was from the center line and in which direction?

A. Well, sir, I would have to figure this. I have the measurement taken and a cross-section of the highway.

Q. Let me ask you this: Was the center line in the physical center of the highway?

A. Within a minute distance either way.

Mr. Maxwell: Thank you. You may cross-examine. [24]

Cross-Examination

By Mr. Gearin:

Q. Officer, you have been asked to testify in our behalf in this proceeding, haven't you?

A. Yes, sir; I have.

(Testimony of Byron D. Winningham.)

Q. There was a lot of debris all over the highway when you got there? A. Yes, sir.

Q. Would it be a fair statement to say there were lots of gouge marks and marks on the highway that showed there that you did not identify or didn't measure as to their position?

A. There were other gouge marks that I didn't measure or locate.

Q. They were scattered pretty well all over, weren't they?

A. Well, sir, in a general direction. However, they were in different forms. That is, they didn't pattern each other as far as being one made by the same thing. There was a variation in the design that they left.

Mr. Gearin: Thank you, Officer. We have no questions.

(Witness excused.) [25]

JOHN W. PAXTON

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Where do you reside, Mr. Paxton?

A. 1006 Laurel Street, Klamath Falls, Oregon.

Q. What is your occupation?

(Testimony of John W. Paxton.)

A. Oregon State policeman.

Q. Did you have occasion to go to the scene of the accident on the railroad overpass on Highway 97 on April 14th, 1954? A. Yes, sir.

Q. What did you do there?

A. I assisted Officer Winningham in the investigation, and also taking measurements of the scene and directing traffic.

Q. Did you assist him in making the measurements? A. Yes.

Q. Did you hear Officer Winningham's testimony here, Mr. Paxton? A. Yes.

Q. If asked the same questions would you give substantially the same answers? A. Yes.

Mr. Maxwell: I have no further questions.

Mr. Gearin: I have no questions, Officer.

(Witness excused.) [26]

MERTON LANG

was produced as a witness in behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maxwell:

Q. Where do you live, Mr. Lang?

A. Eugene, Oregon.

Q. What is your occupation?

(Testimony of Merton Lang.)

A. Terminal Manager for Consolidated Freightways.

Q. On April 14th, 1954, where did you live and what was your occupation?

A. I lived at Klamath Falls, Oregon, at that time and I was Terminal Manager for Consolidated Freightways here in Klamath Falls.

Q. Did you go to the scene of the accident that occurred on the highway overpass on April 14th, 1954? A. Yes.

Q. About what time did you arrive there, Mr. Lang?

A. Well, approximately a quarter after seven.

Q. And what did you observe there?

A. Well, I investigated the accident, and the prime objective was to make sure that we had officers there. They were both there, or one of them I know for sure was there when I got there. And I did ask the officer if he was taking the measurements, and so forth, which I would have done if he hadn't been [27] there, and he said he had. Then I just proceeded to investigate and look over the accident.

Mr. Maxwell: May I ask that the witness be handed the photographs, Exhibit 2.

Q. Will you look over the photographs, Exhibit 2, Mr. Lang, and I will ask you if those are fair representations of the scene of the accident and the vehicles as they appeared after the accident?

A. Yes, exactly.

Q. Did you observe any gouge marks upon the

(Testimony of Merton Lang.)

highway? A. Yes, I did.

Q. Would you describe what you saw?

A. Well, I can describe it off of one of the photos here, if that is permissible. There is one distinct gouge mark.

Q. Mr. Lang, before using a photograph would you turn it over and read the number on the back of it.

A. Yes. 2-G. These gouge marks I observed and they could be traced distinctly to the Converse rig.

Q. Describe where they started, Mr. Lang.

A. Well, I would have to go back to Exhibit 2-K. They started just a short distance behind our trailer and the gouge mark continued over and across the center line of the highway there.

Q. When you say "across it" to which side do you mean?

A. To the Consolidated side or the east side. [28]

Q. Now, Mr. Lang, at the scene of the accident did you talk to the driver of the Converse rig?

A. Yes, I did.

Q. Did he make any statement to you concerning the accident or his conduct preceding the accident?

A. Yes, he did.

Q. What was his statement?

A. He told me that he was lucky to be alive; that he had been driving with his hand or his arm and his head out of the window and wiping off the windshield.

Mr. Maxwell: Thank you. You may cross-examine.

(Testimony of Merton Lang.)

Cross-Examination

By Mr. Gearin:

Mr. Gearin: Your Honor, may I open the sealed exhibit, which is Pre-Trial Exhibit 4?

Mr. Maxwell: No objection.

Q. (By Mr. Gearin): Mr. Lang, you made a report of this accident to Consolidated Freightways, Inc., Accident Investigation Board, didn't you?

A. Yes, I filled out the accident report.

Mr. Gearin: I am going to ask that this document be marked Exhibit 4-A by the reporter, being a portion of the sealed exhibit to be used for impeachment purposes only, and handed to the witness.

(The document referred to was marked by the reporter as Defendant's Exhibit 4-A.) [29]

Q. Mr. Lang, there is being handed you a document, which is the Investigation Board's decision, the report of Consolidated Freightways to Interstate Commerce Commission, and your report to your company regarding your conversation with Mr. Boyle. Will you look at those documents and see if I am correct? A. Yes, that is correct.

Q. Isn't it a matter of fact that you told your employer that Mr. Boyle told you that he was lucky to be alive, and that he was driving with his head out of the window? Look at the last page. Look at your report, please.

A. Yes, that is correct.

(Testimony of Merton Lang.)

Q. You didn't tell your employer that Mr. Boyle told you he was cleaning off his windshield, did you?

A. Apparently I did not in the report.

Mr. Gearin: That is all.

Mr. Maxwell: I have no further questions.

(Witness excused.)

Mr. Maxwell: Plaintiff rests, your Honor.

(Thereupon, after cautionary instructions to the jury by the Court, an adjournment was taken until 9:45 a.m., Friday, August 5, [30] 1955.)

August 5, 1955

The Court: You may proceed.

BYRON D. WINNINGHAM

was produced as a witness in behalf of the defendants and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Winningham, what were the weather conditions as you were approaching the scene of the accident?

A. There was spots of ground fog, very dense.

Q. Will you state whether or not you received an emergency call to go to the scene of the accident?

A. Yes, sir; I did.

(Testimony of Byron D. Winningham.)

Q. As you approached the overpass will you state how fast you were driving your police car.

A. After I reached Highway 97 I slowed down to, oh, ten or fifteen miles an hour.

Q. Where did the heavy fog begin?

A. I came in on Sutton Road, which is northeast of the overpass, and I reached the dense fog just about the railroad tracks.

Q. About how far would that be from the place of the accident? [31]

A. About three-quarters of a mile.

Mr. Gearin: I have no further questions.

Mr. Maxwell: I have no cross-examination.

(Witness excused.)

ROBERT ADAMS

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Adams?

A. Warrenton.

Q. Warrenton, Oregon? A. Yes.

Q. What is your occupation?

A. Truck driver.

Q. By whom are you employed at the present time? A. Walter Freeman.

(Testimony of Robert Adams.)

Q. By whom were you employed in April of 1954? A. L.A.-Seattle.

Q. That is the Los Angeles-Seattle Motor Express? A. Yes. [32]

Q. Did you come upon the scene of this accident we have been discussing here on the overpass on April 14th between a Consolidated rig and a Converse rig? A. Yes.

Q. Had you seen the Consolidated rig prior to the time that you saw it in the accident?

A. Yes.

Q. Where was the first time that you saw it that day or that morning?

A. Well, the first time was at the "bug station."

Q. You mean Dorris? A. Yes.

Q. When was the last time you saw it before the accident?

A. Well, I caught up with him going up Dorris hill.

Q. Then when was the last time you saw him before the accident?

A. Well, just as we were dropping off Dorris hill we hit a solid bank of fog and I backed off, and that is the last I saw of him.

Q. How fast were you going at that time?

A. About 50 miles an hour.

Q. You say you backed off. What does that mean? A. Slowed down.

Q. About how far was that from the scene of the accident?

A. Oh, five or six miles, I suppose. [33]

(Testimony of Robert Adams.)

Q. At any time did you see the Consolidated rig stop on the highway or off the highway?

A. No.

Q. At any time did you see the Consolidated driver or helper do anything with his air filter or any mechanical portion of his rig? A. No.

Q. How fast was the Consolidated rig going the last time you saw it?

Mr. Maxwell: If the Court please, the plaintiff objects to that on the ground of immateriality by reason of remoteness.

Mr. Gearin: We can tie it up, your Honor.

The Court: The speed six miles from the accident?

Mr. Gearin: And the time that he arrived at the accident and what had occurred at that time would be relevant, your Honor.

The Court: I think it is too remote. Objection sustained.

Q. (By Mr. Gearin): Mr. Adams, what was the first thing that called your attention to the fact there was something wrong up on the highway ahead of you?

A. Well, the Converse driver come staggering down the road.

Q. When you say "staggering" what do you mean by that?

A. Well, he was apparently in a state of shock. He was [34] trying to stop me. He was right square—I just come right up on him; that is all.

Q. You don't mean he was intoxicated?

(Testimony of Robert Adams.)

A. Oh, no, no, no. However, that was my first impression.

Q. Had he been injured? A. Yes.

Q. All right. Now from the time that you slacked off and last saw the Consolidated rig up to the time of the accident will you tell us what the fog conditions were, if any?

A. Well, it was solid, it was a solid bank of fog the full length of it.

Q. How far could you see ahead of you?

A. Well, I wouldn't be able to say in feet, but not very far.

Mr. Gearin: You may inquire.

Mr. Maxwell: I have no questions.

(Witness excused.) [35]

EUCLID THOMPSON

was produced as a witness in behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. You are Euclid Thompson? A. Yes.

Q. Where do you live, Mr. Thompson?

A. Woodburn, Oregon.

Q. What is your occupation?

A. Truck driver.

Q. By whom are you employed at the present time? A. Warren Williams.

(Testimony of Euclid Thompson.)

Q. That is Williams Freight Line?

A. Yes, sir.

Q. By whom were you employed in April of 1954? A. Exley Produce Express.

Q. Did you come upon the accident we have been talking about here? A. Yes.

Q. Had you seen the Converse rig prior to that time? A. Yes.

Q. When did you first see the Converse rig that day? A. North of Klamath Falls.

Q. When was the last time that you saw the Converse rig [36] before the accident?

A. I believe it would be about three-quarters of a mile, maybe a half a mile, before the accident.

Q. What were the weather conditions at a point approximately three-quarters of a mile north of the scene of the accident? A. It was heavy.

Q. Heavy what? A. Heavy fog.

Q. Was that fog patchy or continuous? How would you describe it from that point to the point of the accident? A. It was continuous.

Q. Can you give us any idea what the visibility was, how far you could see ahead?

A. Approximately 50 feet.

Q. Do you know who arrived at the scene of the accident first, after the accident that would be, going in a southerly direction?

A. There was a West Coast was behind me.

Q. It was behind you? A. Yes.

Q. Were you the first driver there south bound?

A. Yes.

(Testimony of Euclid Thompson.)

Q. Will you describe what happened and what you saw as you came upon the scene of the accident?

A. Well, as I was approaching I dropped another gear, and [37] the Converse was laying on its side there, and I was on top of it before I realized that the road was blocked, and there was no one out to give me a sign to slow down.

Q. Did you see anybody on the highway north of these rigs waving traffic down?

A. Not out far enough where I could stop, no.

Q. How close did you come to the wrecked vehicles before you were able to stop?

A. I hit the trailer, one of the trailers, that was across the road.

Q. At that time what were the weather conditions with regard to fog? A. Heavy fog.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Maxwell:

Q. How was the temperature, Mr. Thompson?

A. Pardon?

Q. How was the temperature?

A. I wouldn't know how to say the temperature would be.

Q. Was it freezing? A. No, sir.

Q. Was it cold? A. Chilly, I would say.

Mr. Maxwell: That is all.

(Witness excused.) [38]

CHESTER A. BOYLE

was produced as a witness in behalf of defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Boyle, you are one of the defendants in this case? A. Yes, sir.

Q. What is your occupation?

A. Truck driver.

Q. How long have you been driving truck?

A. Approximately 15 or 20 years, most of the time.

Q. Are you a little hard of hearing?

A. Just a little bit; not much.

Q. If you don't hear any of my questions or don't hear them clearly, or those of Mr. Maxwell, will you make it known to us? A. Yes.

Q. By whom are you employed at the present time? A. Converse Trucking Company.

Q. You were the driver involved in this accident we have been talking about? A. Yes.

Q. Where did you pick up your load?

A. At Portland.

Q. Where were you going? [39]

A. At Portland.

Q. Where were you going?

A. To Berkeley, California.

Q. You had bills of lading in your rig?

A. Yes.

(Testimony of Chester A. Boyle.)

Q. Whose bills of lading were they?

A. Converse Trucking.

Q. Did you have a waybill manifest?

A. I suppose it was in the envelope with the other papers, yes.

Q. Now, Mr. Boyle, do you recall when it was that you left Portland?

A. Between twelve and one on the 13th.

Q. Were you alone? A. Yes.

Q. Did you have one of those sleeper arrangements or were you just all by yourself?

A. All by myself.

Q. Now as you left Portland what time did you get into Klamath Falls?

A. Approximately nine o'clock.

Q. What did you do at Klamath Falls?

A. I went to bed.

Q. Where did you stay, do you recall?

A. The Anchor Hotel.

Q. What time did you leave Klamath Falls the next morning? [40]

A. Approximately six o'clock.

Q. Now one other thing, Mr. Boyle. Perhaps you misunderstood me. You said you are employed by Converse at the present time? A. No, sir.

Q. By whom are you employed now?

A. Asbury Trucking.

Q. As you left Klamath Falls will you describe what the weather was when you got south of town?

A. It was patchy fog, very heavy in places and clear in places.

(Testimony of Chester A. Boyle.)

Q. Did the condition of patchy fog continue until the time of the accident?

A. No, it was clear in places.

Q. Perhaps you didn't understand me. Was it patchy and clear all the way to the accident?

A. Yes. The first patch was right here out of town and I hit another one on top of the hill, the hilltop out there, and another bunch before I had the accident.

Q. What was the weather condition at the time of the accident? A. Foggy.

Q. For how long a distance prior to the time that you went into the accident had it been foggy?

A. I would say approximately three-quarters of a mile.

Q. Will you tell us if you can how dense that fog was, if [41] it was dense?

A. Well, it was very dense, but I have no way of describing how dense.

Q. Did you have your lights on? A. Yes.

Q. How far could you see ahead of you that morning as you approached say within a quarter of a mile of the scene of the accident?

A. Oh, approximately 20 or 30 feet.

Q. As you approached the scene of the accident on which side of the road were you, Mr. Boyle?

A. On the right-hand side.

Q. Through what were you looking immediately prior to the accident?

A. I was looking out the window, had my head

(Testimony of Chester A. Boyle.)

out the window looking at the white line on the road.

Q. From your position there what could you see with reference to the white line? Could you see the white line with your head out the window?

A. Yes.

Q. Where was the truck with reference to the white line?

A. Probably ten or twelve inches from the white line at all times.

Q. On which side?

A. On the right-hand side.

Q. Do you recall talking to Mr. Lang, the man in the pink [42] shirt back here, after the accident?

A. I remember the face, but I don't remember whether I talked to him or not.

Q. Did you talk to a representative of Consolidated Freightways there?

A. I think so, yes.

Q. I will ask you this: Were you at any time as you approached the scene of the accident wiping off the exterior portion of your windshield?

A. No.

Q. Did you ever tell anybody that?

A. No.

Q. All right. Now about how fast were you going as you approached the scene of the accident?

A. Between 25 and 30.

Q. What was the first thing that you knew something was wrong?

(Testimony of Chester A. Boyle.)

A. When I noticed this set of headlights in front of me.

Q. About how far were they in front of you when you first saw them, if you know?

A. I would say approximately 20 feet. I don't know for sure.

Q. Where were they with reference to the front of your truck?

A. It looked like they was over the line, as far as I could tell. I couldn't tell exactly where they were at, but I [43] know they were close to me.

Q. What happened then?

A. The wreck happened right after I seen them.

Q. I take it there is no question and I think the photographs show that your truck went on south aways and over to the right, and the Consolidated rig flopped over north of where you came together?

A. Yes.

Q. All right. What did you do right after the accident?

A. I got out, stopped the motor, looked for some flares or fusees, but my cab was jumbled up so I couldn't find any. I ran down to the end of the ramp to stop other trucks I heard coming.

Q. Who was the first driver that approached from the south? A. Mr. Adams.

Q. Do you remember seeing him there?

A. Yes.

Q. Then did you ride with Mr. Cornelson back to the hospital afterwards?

A. Yes. Albert, I believe his name is.

(Testimony of Chester A. Boyle.)

Q. Do you recall his accusing you of being on the wrong side of the road?

A. I remember talking to him for a moment after the accident, but I don't remember just what—I identified myself and asked who the other driver was. [44]

Mr. Gearin: I have no further questions.

Cross-Examination

By Mr. Maxwell:

Q. Mr. Boyle, what kind of a load did you have on on this trip? A. Carbide, canned carbide.

Q. Do you know what the width of your equipment and load was?

A. Not exactly. Approximately 18 ton. I know I didn't have quite a full load.

Q. You left Klamath Falls about six o'clock in the morning? A. Yes, sir.

Q. And you hit patchy fog, as I understand it, right up to the overpass? A. Yes.

Q. You were familiar with that road, were you, Mr. Boyle? A. Yes.

Q. When did you start driving with your head out of the window?

A. When I got in the patchy fog right before the accident.

Q. How far back before the accident were you driving with your head out the window?

A. Oh, approximately a half a mile; between a half and three-quarters.

(Testimony of Chester A. Boyle.)

Q. And you were driving at a speed of around 30 miles an hour? [45] A. At that time, yes.

Q. And a speed of 25 to 30 miles an hour at the time of the accident? A. Yes.

Q. Did you receive any injuries in the accident, Mr. Boyle? A. Yes.

Q. What injuries did you receive?

A. I had my left hand mashed, crushed, and my left arm and also my left ankle.

Q. Where was your left arm?

A. It was laying in the window of the truck.

Q. You were driving with your right hand?

A. Yes.

Q. Just one hand? A. Yes.

Q. That had been for this whole half mile, approximately? A. Yes.

Q. Did you have a defroster on your truck, Mr. Boyle? A. No.

Q. Did you have any equipment for combating steam on your windshield? A. Yes.

Q. What did you have?

A. An electric fan.

Q. Was that operating at the time? [46]

A. No.

Q. Was the windshield steamed up?

A. No.

Q. But you were looking out of the window rather than through the windshield? A. Yes.

Q. Did I understand from your testimony that you were looking at the white line?

A. Yes, I was looking at the white line or yellow

(Testimony of Chester A. Boyle.)

line, or whatever they have up here. I have referred to it as a white line because they have them in California, but it was a yellow line.

Q. How many lines are there?

A. One up to the bridge, up to the overpass.

Q. As far as you recall, up to the point of the accident there was one yellow center line?

A. No, three lines on the overpass.

Q. And the accident did occur on the overpass?

A. Yes.

Q. As I understand it, you could only see 20 or 30 feet ahead of you? A. Yes.

Q. That had been true for this whole half a mile?

A. It was a little bit denser at the overpass than it was when you first went into it.

Q. You could only see 20 or 30 feet ahead of you when you [47] first saw the lights of the other vehicle? A. Yes.

Q. At that time your speed was 25 to 30 miles an hour? A. Yes.

Mr. Maxwell: I have no further questions.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Gearin: Mr. Maxwell, will you stipulate with me that the rig of Consolidated Freightways was approximately but not to exceed 60 feet in length and approximately but not to exceed 12 feet in height and approximately but not to exceed 8 feet

in width, and its total weight was approximately but not to exceed 76,000 pounds?

Mr. Maxwell: I don't know, but I will inquire, if I may have a moment, your Honor. I will so stipulate.

Mr. Gearin: Then the defendants rest, your Honor.

Mr. Maxwell: The plaintiff has no rebuttal, your Honor.

Mr. Gearin: I would like to take up a couple of legal questions for a few minutes, if I may, your Honor.

The Court: Yes.

(Short recess, during which the following occurred out of the presence and hearing of the jury.)

MOTION FOR DIRECTED VERDICT

Mr. Gearin: At this time, if the Court please, the defendant Sacramento Freight Lines, a corporation, and [48] Luisotta Brothers, a partnership, move the Court for an order directing the jury to return its verdict in their favor and against the plaintiff on the plaintiff's claim for damages on the ground and for the reason that there is no evidence that these moving defendants had any control or right to control the movements at that time. The pretrial order recites as an agreed statement that the tractor was owned by Luisotta Brothers and the trailer was owned by Sacramento Freight Lines, and that the tractor and trailer were being operated by defend-

ant Converse through his employee Mr. Boyle. It is not shown that this movement was a movement for or on behalf of Luisotta Brothers or Sacramento Freight lines. Mr. Boyle testified that he was working for Converse and that the bills of lading were those of Converse Trucking Company.

We have then, your Honor, the situation where the only reason for the moving defendants being in the case is because of the bare title to the equipment. Although it may raise a presumption, the presumption has been dispelled by the uncontradicted testimony of Mr. Boyle. There is no testimony that they were operating the truck and trailer at that time.

Mr. Maxwell: I am not certain that I quite understand counsel's motion. I am a little confused in my mind, your Honor. As I understand it, the motion was not for a dismissal [49] as to those defendants but was for a judgment in their favor against——

Mr. Gearin: No, the motion was for an order directing the jury to return a verdict in their favor and against the plaintiff on the plaintiff's claim as against them, because they were not responsible for the operation.

Mr. Maxwell: The motion, then, does not relate to the so-called counterclaim?

Mr. Gearin: No, I didn't intend it to be.

Mr. Maxwell: Under the circumstances I don't see any basis for resisting that motion, your Honor.

The Court: All right.

(Thereupon counsel for the respective parties argued the cause to the jury, and thereafter the Court instructed the jury as follows:)

INSTRUCTIONS TO THE JURY

The Court: Lady and gentlemen of the jury, you have heard all of the evidence and the arguments of counsel in this case which is now entitled Consolidated Freightways, Inc., a corporation, Plaintiff, vs. R. N. B. Converse, doing business as Converse Trucking Service; Sacramento Freight Lines, a corporation; Luisotta Brothers, a partnership, and Chester A. Boyle, Defendants.

The Court is now required to give you instructions on the law of the case. The questions of fact are solely for you. You make up your minds as to all the disputed questions of fact and also as to the credibility of the witnesses, because upon the credibility of the witnesses the facts themselves depend to a certain extent. That is solely committed to you.

However, the Court does have a function to outline the rules of law which are applicable in this case, and in this case they are extremely important.

The arguments of counsel, you will remember, are made by lawyers who are employed by the respective parties in the case, and you expect them, of course, to take a partisan approach. Each of them have been employed to represent a person, and it is their duty to present that side of the case as best it may be. So you may consider that in taking into consideration the arguments of counsel. But the facts themselves and the credibility of the witnesses are for your independent determination. Of course, you can follow counsel in any of the inferences or suggestions that counsel may make, but the arguments of

counsel are not evidence and they are not binding upon you. The evidence itself is and upon that basis you must decide the case.

Now the jurisdiction of this court has been established by allegations of diversity of citizenship, and the parties are agreed to certain facts which I will read you:

That on or about April 14th, 1954, on Highway 97 in [51] Klamath County, Oregon, at a point approximately five miles south of Klamath Falls, a collision occurred between a truck and trailer owned and operated by plaintiff Consolidated Freightways, which was proceeding northerly on said highway, and a certain Peterbilt tractor owned by Luisotta Brothers and a certain Trailmobile trailer owned by Sacramento Freightways; that the truck and trailer were operated by defendant Converse Trucking Company by its employee, Chester A. Boyle.

The damages are set out in the amount of damages agreed upon, and that will be submitted in the forms of verdict according to which way you decide this case, so you need pay no further attention to that.

Now, this case is a civil action for damages, and the respective parties are attempting to recover against the other, there being a counterclaim in this case—In going over these forms of verdict I don't seem to have any form of verdict on that side of the situation. Will you look these over, counsel?

Mr. Gearin: The forms we have here are three in number. May I explain the situation, your Honor?

The Court: That is all right, then. But there is a situation that has to be taken care of, isn't there, because you have now made an agreement——

Mr. Gearin: I didn't understand your [52] Honor.

The Court: There are certain defendants against whom in any event, as I understand it, there can't be any recovery.

Mr. Gearin: That is correct.

The Court: That is not taken care of in the verdicts. ?

Mr. Gearin: I am sorry. May I do it in long-hand, your Honor?

The Court: Yes, that is all right.

Mr. Gearin: I think I can rectify it if I may use a copy of the verdict.

The Court: Ladies and gentlemen, I will excuse you for just a moment until we find out just what this situation is.

(The jury was excused from the courtroom, and the following occurred out of the presence of the jury:)

The Court: As I understand the situation, you made a motion for a directed verdict on plaintiff's claim as against certain defendants.

Mr. Gearin: Yes, your Honor.

The Court: Now, the verdict reads against all defendants.

Mr. Gearin: I see the situation. I am going to try to rectify it now.

The Court: All you have to do is to caret in "against the defendants Converse Trucking Com-

pany and Chester Boyle," as I understand the situation. [53]

Mr. Gearin: All right. That would be fine.

The Court: That is all that is necessary. Put in the defendants Converse and Boyle.

(Thereupon the jury returned to the courtroom and the Court further instructed the jury as follows:)

The Court: Now we have settled this matter by a conference between counsel and the Court. The Court has already directed that if you find that the plaintiff, Consolidated Freightways, is entitled to recover in this case it could only recover against Converse and Boyle. It cannot recover against Sacramento Freight Lines, a corporation, and Luisotta Brothers, a partnership, even though it be found to be entitled to recover.

Now, there is a counterclaim in the case which is urged, on the other hand, by Sacramento Freight Lines and Luisotta Brothers because, though they were not managing the truck and trailer, if you find that the plaintiff Consolidated Freightways was guilty of negligence then, irrespective of the negligence of Converse, Luisotta and Sacramento would be entitled to recover if they prove that Consolidated was itself negligent.

That makes up the issue in the case, because the parties have agreed that the questions of fact which you are to determine are these: Were the defendants guilty of [54] negligence in any particular as charged by plaintiff—and that means Converse and Boyle—

and, if so, was such negligence a proximate cause of plaintiff's damage. Second, was the plaintiff guilty of negligence in one or more of the particulars charged by defendants and, if so, was that negligence a proximate cause of defendants' damage.

This case is based on negligence, but it is a peculiar situation in this case that all of the duties are laid down by statute, so if you find that one side or the other violated them that would be negligence in and of itself and would require nothing further, because the rules are laid down by statute.

Now, these are the statutes which are here involved, and you will see that these are controlling and fit exactly into this situation. The statute provides that no person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway, the hazards at intersections and any other conditions then existing.

The statute further provides that no person shall drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with the legal requirements and the duty of drivers and other parties using the highway [55] to exercise due care.

Further, the statute provides that upon all highways the driver of a vehicle shall drive on the right half of the highway except when (a) the right

half is out of repair and for that reason is impassable, or (b) when overtaking or passing another vehicle in accordance with the other provisions of the statute; and in driving upon the right half of a highway the driver shall drive as close as practicable to the right-hand edge or curb of the highway except when overtaking or passing another vehicle, or when placing a vehicle in a position to make a left turn.

The statute further provides the normal position of vehicles when a highway is divided into lanes. Whenever any street or highway has been divided into clearly marked lanes for traffic, the drivers of all vehicles shall obey the following regulations: A vehicle shall normally be driven in the lane nearest the right-hand edge or curb of the highway when the lane is available, except when overtaking another vehicle or in preparation for making a left turn. A vehicle shall be driven as nearly as practicable within a single lane and shall not be moved from such lane until the driver has ascertained that such movement can be made in safety.

Now, a violation by either of these drivers of the vehicles of the provisions of these statutes which have just been read to you constitutes negligence in and of itself, and that would establish negligence, if you find it was violated, either on one side or the other. So that lays down a very, very positive rule on the subject, since each of these parties contend negligence on the other side on practically the same basis, namely, that the other failed to keep any or a proper lookout, or to keep the vehicle under any

or proper control; that they operated the vehicles at speeds greater than was reasonable and prudent under the circumstances then and there existing; that they failed to operate the vehicles in the right-hand half of the main traveled portion of the highway, although said portion of the highway was unobstructed and available for use; that the vehicle was operated in more than one lane of a two-lane highway; that said vehicles were allowed to cross the center line of said highway and encroach upon the left-hand half thereof when the same was occupied by the vehicle of the other party; and that they failed to yield the right-of-way to the vehicle of the other party.

Those charges are made equally on each side, and you have the situation before you. You have heard all of the evidence in the case. It is purely a question of fact for you to determine.

Of course, the salient point about the thing is that it is a question of on which side of the highway were the vehicles when the accident occurred. If you determine that point you can make up your minds pretty generally [57] primarily what the situation is, because there is one thing certain about this: That some vehicle was on the wrong side. So the first thing you have to make up your minds on is which one it was. I can't give you any guides on that. That is a pure question of fact. The credibility of the witnesses does enter into that situation.

As I said before, on the question of damage, if you find that there was, that is set out in the ver-

dicts, so you do not need to worry about that. It is according to which side you have decided for. The amounts of damage are stated in the verdicts, and they are right there.

Then suppose you find that both sides were negligent in the particulars set up by the other side, namely, in one of the statutory provisions or the other, then you must decide for the defendants. If they both violated a statutory duty then you must decide for the defendants.

Before either one side or the other can recover they must prove their charge of negligence by a preponderance of the evidence. "Preponderance of the evidence" sounds mysterious, but it really isn't. It simply means by the greater weight of the evidence, better evidence, that which is more convincing to your minds than the type of evidence produced by the other side. As I say, there again the credibility that you give these witnesses comes right squarely to the forefront.

The rule is that you are the sole and exclusive judges [58] of the facts in the case and the credibility of all witnesses. Your power of judging the evidence is not arbitrary but must be exercised always with legal discretion and in accordance with the rules of evidence.

You are not bound to return a verdict in accordance with the statements of any number of witnesses which you do not believe as against the testimony of other witnesses to whom you give full credit and belief or against other evidence which you do believe or against an inference therefrom.

Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which he testifies, by the character of his testimony, or by other factors which weaken his power of observation, or may be overcome by other evidence or contradictory evidence or by testimony affecting his character or motives.

Now it is true that a witness may be mistaken in some part of his testimony and that does not necessarily affect his credibility at all. But if he testifies falsely in any material part of his testimony, of course, you may then look with suspicion upon other things that he has testified to, and if you find that he has testified wilfully false then you would be entirely at liberty to disregard all the other testimony that he has given except as you are convinced by other testimony which corroborates it.

Of course, in that regard the physical [59] evidence that you have as to the highway and the positions of the vehicles and the pictures may all be used. That really constitutes indirect evidence. Direct evidence is the testimony of an eyewitness, and as such is rarely available. Indirect evidence is the proof of facts or circumstances surrounding an issue of fact which tends to establish the contention of one or the other of the parties. Of course, physical evidence is something you can use, or indirect evidence is something that you can use, and sometimes it is more convincing than the direct evidence of an eyewitness, because when physical evidence speaks to you in such terms then it might be that you could decide the case upon that, together with all the other evi-

dence in the case. So physical evidence is very important. But it is not controlling and must be weighed with all the other elements in the case. And that is the situation you have here, because you have considerable physical indirect evidence in this case. And there again it is your duty to appraise that, find out what these physical circumstances mean and what inferences you think logically can be drawn from them.

Now in this case the plaintiff, in the first place, in order to be entitled to recover must prove the negligence of the defendants Converse and Boyle by a preponderance of the evidence. On the other hand, if it fails and you find that the defendants have not proved by a preponderance of [60] the evidence that Consolidated itself was guilty of negligence in the particulars charged then you would find a verdict for the defendants. If, on the other hand, you find that the defendants have proved that the plaintiff was negligent, thereupon they would be entitled to recover; that is, in that event Sacramento Freight Company and Luisotta Brothers would be entitled to recover upon their counterclaim without any attention being paid to the supposed negligence of Converse or Boyle. Therefore, you have kind of a three-cornered proposition, but I think that the situation is sufficiently clear so that you can determine this question between the parties.

You will now be excused for a few minutes while I take up some questions of law.

Mr. Gearin: Your Honor, Mr. Maxwell and I

have agreed that will not be necessary. There will be no objection by either party.

The Court: Ladies and gentlemen, then you will have with you in the juryroom the exhibits which have been introduced in the case and the forms of verdict, which are three in number.

If you find that the plaintiff has not proved the charges of negligence against Converse and Boyle, then you will use this form of verdict: "We, the jury duly impaneled and sworn to try the above-entitled cause, do find [61] our verdict in favor of defendants and against the plaintiff." If, on the other hand, you find that the defendants Sacramento Freight Lines and Luisotta have proved that the plaintiff Consolidated Freightways were negligent, then you will use this form of verdict: We, the jury duly impaneled and sworn to try the above-entitled cause, do find our verdict against plaintiff and in favor of defendants Sacramento Freight Lines and Luisotta Brothers and assess defendants' damages in the sum of \$10,483.86.

On the other hand, if you find that the plaintiff has proved that the defendants Converse and Boyle were negligent, and it is not proved that Consolidated Freightways itself was negligent, then you will use this form of verdict: We, the jury duly impaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff and against the defendants Converse and Boyle and assess plaintiffs' damages at \$10,160.45. Dated at Klamath Falls, Oregon, this blank day of blank, 1955.

In each of these verdicts there is a blank line for the foreman to sign, and whichever one you use out of the three—and you can only use one—will be signed by the foreman alone. You must remember that this is not like a case in the state court. You are here in the federal court and you must all agree to any verdict that is returned, whatever it is. You all must unanimously agree.

Swear the bailiff. [62]

(Baliffs were thereupon sworn, and the jury retired to consider of its verdict.)

(Whereupon proceedings in the above matter on said day were concluded.) [63]

Reporter's Certificate

I, John S. Beckwith, an Official Court Reporter of the above-entitled court, hereby certify that I reported in shorthand the testimony and proceedings had upon the trial of the above-entitled cause on August 4 and 5, 1955; that thereafter I prepared a typewritten transcript from my shorthand notes, so taken, and the foregoing transcript, pages 1 to 63, both inclusive, constitutes a full, true and correct transcript of the testimony and proceedings so taken by me in shorthand on said dates, as aforesaid.

Witness my hand as Official Court Reporter at Portland, Oregon, this 19th day of September, 1955.

/s/ JOHN S. BECKWITH,
Official Court Reporter.

[Endorsed]: Filed October 18, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

- 5/13/54—Filed petition for removal from Klamath County.
- 5/13/54—Filed bond on removal.
- 5/13/54—Filed notice of removal.
- 5/18/54—Filed answer of defts Converse Trucking Service etc., et al.
- 5/18/54—Filed interrogatories submitted to plaintiff by deft. Converse Trucking Service.
- 5/22/54—Filed demand of plaintiff for jury trial.
- 5/22/54—Filed motion of plaintiff for trial, etc., in Klamath Falls.
- 5/24/54—Filed and entered order transferring proceedings to Klamath Falls Term.
- 8/ 4/54—Klamath Falls: Filed and entered pre-trial order.
- 8/ 4/54—Klamath Falls: Record of empaneling jury and trial.
- 8/ 5/54—Klamath Falls: Filed stipulation re use of depositions.
- 8/ 5/54—Klamath Falls: Filed verdict.
- 8/ 5/54—Klamath Falls: Filed plaintiff's exhibits 2a to h.
- 8/ 5/54—Entered judgment for plaintiff against defendants R. N. Converse and Chester Boyle for \$10,160.45 and costs.
- 8/17/54—Filed above judgment.
- 8/17/54—Filed cost bill.
- 8/17/54—Entered judgment in lien docket.

8/17/54—Filed objections to cost bill.

8/19/54—Filed notice to tax costs.

8/30/54—Filed notice of appeal by Converse
Trucking Service and Chester A. Boyle.

9/ 6/54—Filed amended notice of appeal.

10/ 3/54—Filed supersedeas bond on appeal.

10/ 5/54—Filed designation of contents of record
on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for removal; Bond on removal; Notice of removal; Interrogatories submitted to plaintiff by defendant Converse Trucking Service; Answer of defendants Converse Trucking Service, impleaded as Converse Trucking Co., et al.; Plaintiffs' demand for jury trial; Plaintiffs' motion for trial and hearing of all preliminary matters at Klamath Falls, Oregon; Order granting motion for hearings at Klamath Falls, Oregon; Record of empaneling jury; Pre-trial order; Stipulation re depositions; Verdict; Judgment; Bill of costs; Notice of taxing costs; Objections to cost bill; Notice of appeal; Amended notice of appeal; Supersedeas bond; Designation of contents of record on appeal and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein num-

bered Civil 7493, in which R. N. B. Converse, dba Converse Trucking Service, and Chester A. Boyle are the defendants and appellants and Consolidated Freightways, Inc., a corporation, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the costs of filing the notice of appeal, \$5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of October, 1955.

[Seal]

R. DE MOTT,

Clerk;

By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 14900. United States Court of Appeals for the Ninth Circuit. R. N. B. Converse, doing business as Converse Trucking Service, and Chester A. Boyle, Appellants, vs. Consolidated Freightways, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed October 14, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 14900

CONSOLIDATED FREIGHTWAYS, INC., a
Corporation,

Appellee,

vs.

R. N. B. CONVERSE, d/b/a CONVERSE
TRUCKING SERVICE, a Corporation; SAC-
RAMENTO FREIGHT LINES, a Corpora-
tion; LOUISOTTI BROTHERS, a Partner-
ship, and CHESTER A. BOYLE,

Appellants.

STATEMENT OF POINTS
TO BE RELIED UPON

Come now appellants, R. N. B. Converse, d/b/a Converse Trucking Service and Chester A. Boyle, pursuant to Rule 17 of this court, and state that the following point will be relied upon by said appellants upon this appeal:

(1) The verdict was against the weight of the evidence.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

By /s/ JOHN GORDON GEARIN,
Attorneys for Appellants, R. N. B. Converse, d/b/a
Converse Trucking Service, and Chester A.
Boyle.

[Endorsed]: Filed November 29, 1955.

No. 14901

United States
Court of Appeals
for the Ninth Circuit

JOHN PIERCE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMIS-
SION,

Respondent.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 248)

Petition to Review an Order of the
Securities and Exchange Commission

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-27-56

MAY -7 1956

No. 14901

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Securities and Exchange Commission
Washington 25, D. C.

Form BD

Under the Securities Exchange Act of 1934

FORM OF APPLICATION FOR REGISTRA-
TION AS A BROKER AND DEALER OR
TO AMEND OR SUPPLEMENT SUCH AN
APPLICATION

JOHN PIERCE

(Name of Registrant—see Definitions on last
page)

1021 Bracken Avenue, Las Vegas, Nevada.

(Principal Place of Business, Street Address,
City, State)

(Check appropriate box to indicate purpose
for which form is being used:)

- A. This is an Application for Registration as a
Broker-Dealer Filed by the Broker-Dealer
Named Above. ☒

Instructions: If (1) such broker-dealer is a
partnership succeeding to and continuing the
business of a broker-dealer partnership regis-
tered when this application is filed and (2) the
predecessor partnership has filed its applica-
tion or supplement to such application on this
form—then registrant shall furnish only such
information as is necessary to correct the infor-
mation contained in the application of the

predecessor, and the supplements and amendments thereto, which shall be deemed to be incorporated in this application by reference. Unless both conditions (1) and (2) are met, all items in this form should be answered in full.

* * *

1. (a) Name under which business is to be conducted:

John Pierce

(b) If registrant is the successor to the business of another broker or dealer, give the name and address of the predecessor and the date of succession:

[Blank.]

(c) Form of organization (sole proprietorship, corporation, partnership or an unincorporated organization or association which is not a partnership):

Sole proprietorship

2. If sole proprietorship, furnish the full name of proprietor, and his residence address:

Pohn Pierce, 1021 Bracken Avenue, Las Vegas, Nevada.

3. If a corporation, furnish

(a) the state and date of incorporation:

(b) the full name and title of each officer and director, and of every other person occupying a similar status or performing similar functions:

[Blank.]

(c) the full name of each person who, directly or indirectly, is the beneficial owner of 10% or more of any class of any equity securities of such corporation, indicating the class of such equity securities:

[Blank.]

4. If a partnership, furnish the full name of each partner (special or limited partners should be so designated) and the residence address of each general partner who does not reside within the United States:

[Blank.]

5. If an unincorporated organization or association which is not a partnership, furnish the full name of each "managing agent" of such organization or association and the residence address of each such person who does not reside within the United States: (See definition of "managing agent" on last page.)

[Blank.]

6. Does any person not named in Items 2 to 5, inclusive, directly or indirectly control the business of registrant?

If so, furnish the full name and business address of each such person and the residence address of any such person who does not reside in the United States;

[Yes or No]: No.

7. For each individual named in Items 2 to 6, inclusive, attach "Answer to Item 7" showing all

connections within the past ten years with any broker or dealer other than the registrant or any predecessor, and the nature and period of each such connection.

[Blank.]

8. State whether the registrant, any person named in Items 2 to 6 inclusive, any salesman or other employee, or any other person directly or indirectly controlling or controlled by registrant:

(a) Has been convicted, within ten years, of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer.

[Yes or No]: No.

(b) Is permanently or temporarily enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security:

[Yes or No]: No.

(c) Has been found by the Commission to have violated any provision of the Securities Act of 1933 or the Securities Exchange Act of 1934, or any rule or regulation under either of said Acts.

[Yes or No]: No.

9. Registrant consents that notice of any proceeding before the Commission in connection with the application or with registration thereunder may be given by sending notice by registered mail or

confirmed telegram to the person named below, at the address given:

Name: Pohn Pierce.

Address: 1021 Bracken Avenue,
Las Vegas, Nevada.

This Form Should Be Executed by the Registrant (see definitions) Except Where B on Page 1 Has Been Checked (in which case it should be executed by the broker-dealer predecessor making an application for registration on behalf of a successor broker-dealer to be formed or organized.)

All statements contained herein are true and correct to the best knowledge and belief of the persons executing this form.

Dated at Las Vegas, Nevada, the 26 day of October, 1954.

(For sole proprietor):

/s/ JOHN PIERCE,
(Proprietor)

* * *

Answer to Item 7

Salesman With Lester L. LaFortune
Las Vegas, Nevada—1950-1952

Financial Statement of John Pierce
October 26, 1954

Assets

Cash	\$ 3,000.00	
House and Furniture		
1021 Bracken, Las Vegas	20,000.00	
Cadillac Automobile	5,500.00	
Jewelry & Miscellaneous	3,500.00	
Showboat Hotel, Inc. Stock	2,100.00	
		<hr/>
Total Assets		\$34,100.00

Liabilities

Mortgage on house	\$ 9,000.00	
Mortgage on car	1,500.00	
Miscellaneous	500.00	
		<hr/>
Total Liabilities		11,000.00

Net Worth		<hr/> <hr/> \$23,100.00
-----------------	--	-------------------------

State of California,
County of Clark—ss.

John Pierce, being sworn, deposes and says: The foregoing financial statement is true and correct to the best of my knowledge and belief.

/s/ JOHN PIERCE.

Subscribed and sworn to before me this 26th day of October, 1954.

(Seal) /s/ EDWIN J. DOTSON,

Notary Public in and for
Said County and State.

My commission expires 2/19/54.

Received Oct. 28, 1954.

United States of America Before the
Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C., on the 5th day of November, 1954.

In the matter of

JOHN PIERCE, 1021 Bracken Avenue, Las Vegas,
Nevada.

ORDER FOR PROCEEDINGS AND NOTICE
OF HEARING PURSUANT TO SECTION
15(b) OF THE SECURITIES EXCHANGE
ACT OF 1934.

I.

The Commission's public official files disclose that John Pierce, a sole proprietor, hereinafter sometimes called applicant, filed an application with the Commission on October 28, 1954, for registration as a broker and dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934. Registration has not yet become effective.

II.

Members of its staff have reported to the Commission information obtained as a result of an investigation which tends to show that:

A. Since on or about January 1, 1951, applicant, as a broker and dealer has made use of the mails and the means and instrumentalities of interstate

commerce, to effect transactions in, and to induce the purchase and sale of securities, otherwise than on a national securities exchange, when no registration as a broker and dealer was in effect as to applicant under the provisions of Section 15(b) of the Securities Exchange Act of 1934.

B. During the period from approximately October 1, 1951, to the date hereof, applicant sold for and purchased for certain persons, and applicant sold to and purchased from certain persons certain securities; and in connection with the purchases and sales heretofore mentioned made false and misleading statements of material facts and omitted to state material facts and employed schemes, artifices and devices in that:

(a) (1) During the month of February, 1952, applicant solicited and induced a certain person to entrust to applicant for the purposes of sale 1,000 units consisting of one share each of the Preferred and Common stock of Las Vegas Thoroughbred Racing Association, a corporation, and falsely and fraudulently represented that he, the applicant, would sell 200 units thereof at a price of \$3.00 per unit and 800 units thereof at a price of \$4.00 per unit and in response to this solicitation and inducement said person did, in the month of February, 1952, deposit with and entrust to applicant said 1,000 units of the Preferred and Common stock of Las Vegas Thoroughbred Racing Association, endorsed for transfer, for the uses and purposes aforesaid.

(a) (2) Thereafter in March, 1952, applicant falsely and fraudulently represented to said person that applicant had caused 200 of said units to be sold at a price of \$3.00 per unit and that applicant's check in the sum of \$600.00 then and there delivered to said person represented the entire proceeds of said sale.

(a) (3) Thereafter in May, 1952, applicant falsely and fraudulently represented to said person that he had caused 200 additional units to be sold at a price of \$4.00 per unit and that applicant's check in the sum of \$800.00 then and there delivered to said person represented the entire proceeds of said sale. Said check was dishonored by the drawee and returned through intermediary endorsers to said person.

(a) (4) Thereafter applicant falsely and fraudulently represented to said person that he, the applicant, had been unable to complete the sale referred to in the preceding sub-paragraph for the reason that it was not then possible to effect transfers of the shares on the books of the corporation.

(a) (5) The representations and inducements made by applicant described in sub-paragraph (a) (1) of paragraph B were false and fraudulent in that at the time that they were made, applicant knew and failed to disclose to said person that applicant could sell and intended to sell all of said units at a price greatly in excess of \$3.00 or \$4.00 per share, to wit, the sum of \$6.00 per share, and

sons paid the purchase price of \$5,500 and received delivery from applicant of a certificate for 1,100 shares of said common stock and in connection with such transaction applicant made certain false and misleading representations and omitted to disclose certain material facts concerning, among other things, the source of such stock and the then current market price of such stock.

C. Applicant effected, otherwise than on a national securities exchange, certain of the transactions hereinabove mentioned in paragraph B of Section II hereof.

D. Applicant used the mails, the means and instrumentalities of interstate commerce, and the means and instruments of transportation and communication in interstate commerce in effecting certain of the transactions and in the purchase and sale of securities as hereinabove set forth in paragraph B of Section II hereof.

III.

The information reported to the Commission by members of its staff, as set forth in Section II hereof, tends, if true, to show that:

A. Applicant violated Section 17(a) of the Securities Act of 1933, in that in the sale of securities by the use of means and instruments of transportation and communication in interstate commerce and by use of the mails, applicant employed devices, schemes and artifices to defraud and obtained money and property by means of untrue statements

of material facts and omissions to state material facts necessary in or to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon the purchasers.

B. Applicant violated Section 15(a) of the Securities Exchange Act of 1934, in that as a broker or dealer, applicant made use of the mails and the means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of securities (other than exempted securities or commercial paper, bankers' acceptances, or commercial bills), otherwise than on a national securities exchange without being registered with this Commission in accordance with Section 15(b) of said Act.

C. Applicant violated Section 10(b) of the Securities Exchange Act of 1934, in that by use of means and instrumentalities of interstate commerce and of the mails in connection with the purchase and sale of securities applicant directly and indirectly employed devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in acts, practices and a course of business which would and did operate as

a fraud and deceit upon certain customers in contravention of Rule X-10B-5 prescribed by the Commission under said section.

D. Applicant violated Section 15(c)(1) of the Securities Exchange Act of 1934, in that applicant made use of the mails and means and instrumentalities of interstate commerce to effect transactions in and to induce the purchase and sale of securities, otherwise than on a national securities exchange, by means of manipulative, deceptive and other fraudulent devices and contrivances as defined by Rule X-1501-2(a) and (b) adopted by the Commission under said action.

IV.

The Commission having considered the aforesaid information, deems it necessary and appropriate in the public interest and for the protection of investors that proceedings be instituted to determine:

(a) Whether the statements set forth in Section II heretofore are true;

(b) whether applicant has wilfully violated Section 17(a) of the Securities Act of 1933;

(c) whether applicant has wilfully violated Section 15(a) of the Securities Exchange Act of 1934;

(d) whether applicant has wilfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule X-10B-5 prescribed by the Commission under said section;

(e) whether applicant has wilfully violated Section 15(c)(1) of the Securities Exchange Act of

1934 and Rule X-1501-2(a) and (b) adopted by the Commission under said section;

(f) whether pursuant to Section 15(b) of the Securities Exchange Act of 1934 it is in the public interest to deny registration to applicant;

(g) whether pursuant to Section 15(b) of the Securities Exchange Act of 1934 it is necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of registration of applicant until final determination upon the question of denial.

V.

The Commission deeming it necessary and appropriate in the public interest and for the protection of investors that the effective date of registration of applicant be postponed for fifteen (15) days, It Is Ordered that the said effective date be and the same hereby is postponed until December 12, 1954.

It is further ordered that a hearing be held before Edward C. Johnson, Hearing Examiner, or such other hearing examiner as the Commission may designate, at 11:00 a.m., on November 22, 1954, at the office of the Securities and Exchange Commission, located at Room 1737, U.S. Post Office and Court-house, 312 North Spring Street, Los Angeles 12, California on the question whether, pursuant to Section 15(b) of the Securities Exchange Act of 1934, it is necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of registration of the appli-

cant until final determination upon the question of denial. Upon the conclusion of the hearing on the question of such postponement, the Hearing Examiner shall forthwith transmit the record thereon to the Commission. Proposed findings and conclusions and supporting briefs hereon, pursuant to Rule IX(f) of the Rules of Practice, may be filed by the parties with the Secretary of the Commission on or before November 30, 1954. After receipt of the said record and of any proposed findings and supporting briefs, the Commission will issue its findings and opinion on the question of postponement forthwith, if it then finds such procedure necessary and permissible under Section 8(a) of the Administrative Procedure Act; and otherwise the Commission will make provisions for any further procedure which it finds necessary or appropriate.

It is further ordered that, following the above-mentioned hearing, a further hearing be held before the aforesaid Hearing Examiner for the purpose of taking evidence on the question of denial of registration to applicant. Upon the completion of the taking of evidence on these matters the Hearing Examiner shall prepare a recommended decision pursuant to Rule IX(b) of the Rules of Practice, unless such decision is waived, and shall transmit the same with the record of the hearing to the Commission.

It is further ordered that this order and notice

shall be served on applicant personally or by registered mail forthwith.

In the absence of an appropriate waiver, no officer, or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that Section which might delay the effective date of any final Commission action.

By the Commission.

ORVAL L. DuBOIS,
Secretary.

United States of America

Before the Securities and Exchange Commission

At a regular session of the Securities and Exchange Commission held at its office in the City of Washington, D. C., on the 1st day of December, A.D., 1954.

In the Matter of

JOHN PIERCE, 1021 Bracken Avenue, Las Vegas,
Nevada.

AMENDING ORDER

The Commission having, by order dated November 5, 1954, instituted proceedings pursuant to Sec-

tion 15(b) of the Securities Exchange Act of 1934, in the above-entitled matter and having, by order dated November 24, 1954, amended Section II of said order;

The Division of Trading and Exchanges having filed a motion that Sections II, III and IV of said order be amended;

It appearing to the Commission that members of its staff have information which tends to establish the alleged facts referred to in such proposed amendments;

It is ordered that Section II of said order, as amended, be, and the same hereby is, amended by adding thereto Paragraph N to read as follows:

E. As a document supplemental to his application for registration, referred to in Section I of said order, applicant filed a statement of financial condition which is false and misleading with respect to applicant's liabilities in that said statement stated that applicant's liabilities were:

Mortgage on home.....	\$ 9,000
Mortgage on car.....	1,500
Misc.	500
	<hr/>
	\$11,000

when, in fact, at the time of the filing of said application and said financial statement, applicant had, in fact, other liabilities in an amount in excess of \$3,000.

It is further ordered that Section III of said order be amended to include Paragraph E to read as follows:

E. Applicant violated Section 15(b) of the Securities Exchange Act of 1934, and Rule X-15B-8 adopted by the Commission under such section in that he wilfully made in his statement of financial condition filed with the application for registration false and misleading statements with respect to his liabilities.

It is further ordered that Section IV of said order be amended to include Paragraphs (h) and (i) to read as follows:

(h) Whether applicant in the statement of financial condition filed with his application for registration has wilfully made any statement which at the time and in the light of the circumstances under which it was made was false and misleading with respect to any material facts;

(i) whether applicant has wilfully violated Section 15(b) of the Securities Exchange Act of 1934, and Rule X-15B-8 prescribed by the Commission under said section.

By the Commission.

ORVAL L. DuBOIS,
Secretary.

United States of America Before the Securities
and Exchange Commission
(Copy)

In the Matter of
JOHN PIERCE, 1021 Bracken Avenue, Las Vegas,
Nevada.

RESPONDENT'S PETITION FOR REHEAR-
ING OF THE COMMISSION'S FINDINGS
AND OPINION

Respondent John Pierce respectfully petitions the Commission to grant a rehearing with respect to the Findings and Opinion dated August 16, 1955, which it has adopted and to adopt, in lieu thereof, the Recommended Decision of the Hearing Examiner herein dated February 8, 1955. Respondent also requests that the Commission grant him oral argument on this petition for rehearing.

The grounds for the petition for rehearing are:

I.

The opinion adopted by the Commission misstates the facts developed in the record; disregards the findings of the Hearing Examiner based on conflicting evidence; and is not supported by the evidence.

II.

The public interest does not require denial of respondent's registration. He has already been punished heavily for his past failure to register as a broker-dealer.

A.

The Hayward Transaction

The Hearing Examiner who saw the witnesses and heard the evidence devoted 131½ pages of his Recommended Decision to a careful review of the facts of this transaction. He found that the charges of fraud “have not been proven.” (R.D.* P. 23) He found the testimony “contradictory in part and confusing and indecisive in other parts.” (R.D. p 23)

The opinion adopted by the Commission discusses the Hayward transaction in a mere 2 pages. (The testimony of Hayward himself covered 73 pages of the Transcript and other witnesses also testified about his transaction.) The Opinion adopted by the Commission doesn't mention the findings of the Hearing Examiner nor the evidence supporting his findings. The Opinion adopted by the Commission creates a delusive appearance of certainty by a combination of suppressions and misstatements, as follows:

On page 5 of the Commission's Opinion it is stated in effect that early in 1952 Hayward asked Pierce to try and sell his stock for \$5.00. The Hear-

*Explanation of abbreviations:

R.D. Recommended Decision of Hearing Examiner, February 8, 1955.

Tr. Transcript of hearing before Hearing Examiner.

C.O. Commission's Opinion dated August 16, 1955.

ing Examiner placed this conversation as prior to January 1952. (R.D. p. 12) Actually Hayward testified (correctly we believe)

“Dates don’t mean a great deal to me, that long ago.” (Tr. p. 55.)

Consequently, efforts to fix precisely the dates of various verbal understandings cannot succeed if attention is paid to the actual testimony.

Furthermore the picture is distorted because the opinion omits Hayward’s testimony that previously Pierce at one time told him he could sell and make a profit and Hayward declined to sell. (Tr. p. 56, 93, 102, 121)

2. The opinion adopted by the Commission states (C.O. p. 6):

“Mr. H. had no independent knowledge with respect to the price of the Racing Association units and relied entirely upon applicant’s representations as to their sale value.”

It is the opinion of Respondent’s Counsel that this statement wouldn’t have been accepted by the Commission if the Commission had been familiar, as the Hearing Examiner was, with the record.

Hayward testified (Tr. p. 107-108) that prior to his decision to sell he visited the track “several times” “I am not a beginner; that is my business. I am around construction all the time * * *”

Hayward testified, that he conferred with “Mr. Smoot and Mr. John La Fortune” as well as with

Mr. Pierce. (Tr. p. 108). Smoot was the first president and promoter of the track. (Tr. p. 432) La Fortune was the underwriter. (Tr. p. 24, 608) A shrewd businessman who examined the work in progress and conferred with at least the president and underwriter as well as with Pierce cannot properly be said, as does the Commission's opinion, to have "relied entirely" on Pierce.

The unsupported statement in the Commission's Opinion that Hayward relied wholly on Pierce as to price appears contrary to the evidence. The finding of the Hearing Examiner that Hayward "drew his own opinion" (R.D. p. 13) and was a "competent, successful and shrewd businessman" (R.D. p. 23) is wholly correct.

3. The opinion adopted by the Commission flatly, and incorrectly, states (C.O. p. 6) that

"on the basis of applicant's representation that the \$5 price Mr. H. desired was not obtainable, the latter agreed to accept \$3 and \$4 for the units to be sold."

The facts, of course, aren't that simple.

Mr. Hayward testified:

"Q. Were these figures suggested by Mr. Pierce, what he could get for the stock?

"A. I don't recall, actually."

(Tr. p. 100)

4. The opinion adopted by the Commission states:

“applicant purported to act on Mr. H.’s behalf to secure for him the best price obtainable.”

(C.O. p. 6)

This statement confirms our suspicion that the Commissioners have read neither the record, the Hearing Examiner’s Recommended Decision, nor Respondent’s Briefs. Otherwise we think that that statement would not have been adopted.

Mr. Hayward testified in answer to questions by Pierce’s counsel as follows:

“Q. And the oral arrangement was that you were to get \$3 for 200 shares and \$4 for the balance, is that correct?

“A. That’s right.”

(Tr. p. 92)

The Hearing Examiner properly recognized that this was a decisive point. Consequently, to avoid any possibility of misunderstanding, he went over the same ground with sharply pointed questions.

“Q. Was that your understanding? You didn’t care whether he sold them for \$10.00 or \$20.00 just so long as you got \$4.00, is that your testimony? That is all I want to know.

“A. Yes.”

(Tr. p. 97)

If, as Hayward testified, he didn’t care whether or not Pierce sold the shares for \$10 or \$20, it obviously couldn’t be fraudulent for Pierce to sell the shares for \$6.

5. The Opinion adopted by the Commission ignores the fact that on over-the-counter shares it is proper for a broker-dealer to make a profit. The Commission knows that in over-the-counter stocks there is an "inside" price and an "outside" price. The price quoted by reputable dealers when one wishes to sell is different from the price quoted when one wishes to buy. And properly so. A dealer is entitled to earn a living. An expert from the Commission's staff testified as follows:

"Q. * * * reputable dealers may quote different prices for the same day, is that correct?

"A. Yes * * *"

(Tr. p. 471)

"Q. And that if one customer goes to the dealer and says he wants to buy and another customer comes in and says he wants to sell, and both tell the dealer that they want to transact their business at the market, the dealer will, nevertheless, and properly so, tell the people who are selling that the market is this and for the people who are buying, the market is this, is this correct?"

"A. That is correct, sir.

"Q. And when he tells the seller that the market price is such and such for a selling customer, he will be quoting a different figure from the figure which he gives to the customer who wants to buy at the market; is that your understanding?

"A. Yes, sir, it is."

(Tr. p. 473)

The testimony by the Commission's own expert confirms that Pierce could properly represent the market to be different for a person seeking to sell from what it would be for a person seeking to buy. Consequently even if he had quoted different prices to those seeking to sell from those who sought to buy, that is no evidence of fraud. Pierce, like the rest of us, is entitled to earn a living. And since Hayward expressly testified that Pierce was entitled to sell his stock for more than \$4 if he could, it is unjustifiable for the Commission to find fraud in what Hayward himself (who knew the understanding better than any of us) didn't regard as improper.

6. The opinion adopted by the Commission erroneously states (C.O. p. 7) that Pierce was fraudulent in his accounting to Hayward of the proceeds of the stock sales.

The correct view of this matter must be based on the entire relationship between the parties, not on selected fragments.

Hayward testified that prior to September, 1952, Pierce came to him and said he had sold his stock but would like a delay in paying.

“Q. And what did you say to that, Mr. Hayward?

“A. It was agreeable to me. I knew I would get it.

“Q. You were willing to grant him the delay, is that correct?

“A. Oh, yes.”

(Tr. p. 76)

True, there was delay in paying Mr. Hayward. But he was willing to grant delay. Pierce, who knew Hayward well, was aware of that. Consequently, there was no fraud. Hayward regarded this as “gravy” (Tr. p. 69). He was willing that Pierce consider it a loan.

Consequently there was no proof of fraud.

Law

In the case of Universal Camera Co., vs. National Labor Relations Board 340 U.S. 474 (1951) the Supreme Court reversed a decision of the Board that was inconsistent with the findings of the Hearing Examiner (as here): In that case the Supreme Court stated:

“* * * on matters where the Hearing Commissioner having heard the evidence and seen the witnesses is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.”

340 U.S. 474, 494

“The committee reports also made it clear that the sponsors of the legislation” [the Administrative Procedure Act] “thought the statute gave significance to the findings of the examiner.”

340 U.S. 474, 496

“* * * the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by the Courts in reviewing every administrative action subject to the Administrative Procedure Act.”

340 U.S. 474, 487

“The findings of an examiner are to be considered along with the consistency and inherent probability of testimony * * * The significance of his report, of course, depends largely on the importance of credibility in the particular case.”

340 U.S. 474, 496

On remand to the Circuit Court of Appeals the order of the Board (which overruled its own hearing officer—as here) was reversed. The Circuit Court of Appeals, speaking through the distinguished Learned Hand, C. J. stated:

“* * * we are not to be reluctant to insist that an examiner’s findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded.”

NLRB vs. Universal Camera 190 F (2)
429, 430.

There is another consideration. According to Professor Cooper of the University of Michigan Law School (consultant to one of the Hoover Commission Task Groups) it is the Securities and Exchange Commission practice for the Commission not

to read the record but to rely on a digest prepared by its staff. (41 American Bar Association Journal 707—August 1955). The professor comments that this practice:

“* * * illustrates the great difficulty that inheres where the members of the agency must rely on the judgment and judicial abilities of junior staff assistants to weigh the evidence.”

(41 American Bar Assn. Journal 707—
Aug. 1955, p. 708)

This practice, it seems, contravenes the high standards that:

“The one who decides must hear.”

Morgan, vs. U.S.

298 U.S. 468, 481 (1936)

Furthermore why not rely on the Hearing Examiner to weigh the evidence? He heard it and observed the demeanor of the witnesses. In our earlier brief we cited authority to show that he, and not junior staff assistants, is the proper person to “weigh the evidence.”

In the present case the opinion adopted by the Commission, so far as the Hayward transaction is concerned, ignores the conclusions of the learned Hearing Examiner as to veracity. It is contrary to the evidence and his findings. Consequently the S.E.C. opinion appears contrary to law. Respondent is entitled to a rehearing.

B.

Transactions With Other Persons. The Opinion adopted by the Commission finds that fraud was not proved in any of the other charges ventilated in extenso at the hearing. Respondent believes the statement in the Commission's Opinion of these transactions is couched in language that unfairly reflects on Respondent. However, charges are not evidence. The express finding that fraud was unproved, in each case, is a complete vindication of Respondent, as to these items. It was, however, an unfortunate burden on him to have to spend days clearing himself of unfounded charges.

C.

Financial Statement. The Hearing Examiner's Recommended Decision devoted 7 pages to an analysis of this point and concluded the omissions were inadvertent and not wilful. The Hearing Examiner heard the witnesses. He was in position to judge the credibility of respondent's explanation. The opinion adopted by the Commission devotes less than one full page to this topic. It ignored the principal facts found by the Hearing Examiner.

The financial statements as filed showed a net worth of \$23,100. If miscellaneous liabilities had been listed at \$3,500 instead of \$500 there could have been no complaint. At the hearing it also appeared, and the Hearing Examiner found, that Pierce had inadvertently omitted an asset worth

more than double the omitted liabilities. (R.D. p. 35 and 36)

Pierce carried no margin accounts. Consequently there was no requirement that he show any particular net worth.

The Hearing Examiner's conclusion that Pierce's net worth was at least as great as set forth in his financial statement is not disputed in the opinion adopted by the Commission. The fact that both assets and liabilities were omitted confirms the finding of the Hearing Examiner, who heard the testimony, that the omission was inadvertent (R.D. p. 38-39) The Commission's opinion in improperly overruling the Hearing Examiner on this matter of veracity, is contrary to law:

“* * * on matters where the Hearing Commission having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.”

Universal Camera vs. NLRB, 340 U.S. 474, 494.

“we are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded.”

NLRB vs. Universal Camera 190 F (2) 429, 430.

Here the Hearing Examiner found in accordance with Pierce's testimony that the omission was inadvertent.

“Mr. Pierce, why didn’t you include this lease as an asset?

The Witness: It was not intentional. It was inadvertent. The same thing goes for those personal obligations that I had. None of them were intentional.”

(Tr. p. 580)

The examination of Pierce was searching. The Hearing Examiner’s finding cannot properly be overruled unless error is “clearly shown” or “a very substantial preponderance in the testimony” against it. Neither test has been met. Consequently it was legally erroneous for the Commission to ignore the Hearing Examiner’s finding on this point.

D.

Public Interest. Mr. Pierce testified (Tr. p. 570) that denial of registration would work a serious hardship on him:

“* * * in the years that I have been in Las Vegas, I have established a fairly good reputation and made some good contacts and there is no question that I can use my registration honestly and logically to make a permanent business of it.”

“Q. And do you desire, at this time, to be registered and to comply with the applicable regulations of the Securities and Exchange Commission?

“A. Yes I do.”

The Hearing Examiner, who heard the testimony, was impressed by Pierce's sincerity and found that:

"it would appear that Respondent has not only learned the error of his ways, but these proceedings have been lengthy and costly and furthermore, since his application for registration has been postponed for a considerable period of time as a result of these proceedings, I conclude that the public interest would not necessarily be served by the imposition of any additional penalty."

(R.D. p. 43)

The imposition of the drastic penalty of denial can properly rest only on the premise that such is necessary to protect the public from Pierce. But the record affirmatively shows that that is not necessary. The Commission investigated hundreds of his transactions. Only one—Hayward's—is now claimed to have been improper. And even there it is significant that both Hayward, the shrewd businessman who was a party to the transaction, and the learned Hearing Examiner who heard the testimony, both concluded that Pierce had not acted improperly. Since that time Pierce has had the penalty of these proceedings imposed on him. Consequently, it appears highly unlikely that such a transaction would occur in the future.

Looked at objectively we find but one possibly improper transaction out of several hundred investigated by the Commission.

That doesn't show a propensity to fraud. On the contrary. Furthermore, in view of the finding of the Hearing Examiner, who, unlike the Commissioners heard the witnesses and knows what the testimony actually was, there was no fraud even in that transaction.

Against such a background the imposition of more than a temporary suspension on account of the Hayward transaction would appear arbitrary and excessive.

Pierce's failure to register earlier was clearly wrong. But now he wants to correct that. He has already suffered a ten month's denial. He has been forced to incur substantial court costs. The odd thing is, of course, that he was unmolested until, acting on the advice of present counsel, he sought to register and regularize his activities. Now he has the book thrown at him. That appears unjustified.

Based on past experience, the public won't be injured by Pierce's registration becoming effective because, in the past, he hasn't injured the public with the single possible exception of the disputable Hayward transaction. Consequently the record affirmatively shows, as the Hearing Examiner found that:

“the public interest will be served by permitting this application to become effective forthwith.”

(R.D. p. 43)

Conclusion

Respondent requests oral argument so he will know that the arguments in his briefs and the Recommended Decision of the Hearing Officer will actually come to the attention of the Commissioners. A rehearing should be granted and the Recommended Decision of the Hearing Examiner adopted by the Commission. The present Commission Opinion isn't supported by the record. Contrary to law, it fails to give proper weight to the findings of the Hearing Examiner. The penalty imposed on Pierce, who has already suffered severely and been suspended for nearly ten months is excessive, cruel and unusual. An excessive penalty is unjust, unwise and harmful to all concerned. A rehearing is called for.

Respectfully,

JOHN G. SOBIESKI,

EDWIN J. DOTSON,

Attorneys for John Pierce.

Dated September 21, 1955.

Filed September 26, 1955.

two bedroom home in the Huntridge area. Since we can only sleep in one bed at a time, you and your lovely wife are always welcome to visit with us for as long as you like.

Kindest regards to your wife and kids and all the fellows I know in Santa Barbara. Hope to hear from you soon.

Sincerely yours,

/s/ JOHN PIERCE.

JP/psp:Enc.

EXHIBIT No. CX5

Prepared from Journal and Ledger and Ctf. Stubs and Ctfs. of Las Vegas Thoroughbred Racing Ass'n Records 7/21/54 by C. R. Burr and S. W. McNair

Date	Common Ctf. No.	Common Shares	Name of	Date	Common Ctf. No.	Common Shares	Name of	Date	Trace to Original Source		Name of
									Common Ctf. No.	Common Shares	
				6/27/50	4489 orig.	1000	Herman Miller	11/ 1/51	10492	10	Steve Juran
								11/ 1/51	10489	20	Mary Taverne
								11/ 1/51	10490	20	Joseph Taverne
								11/ 1/51	10491	40	Rose Taverne
				6/27/50	4489 orig.	1000	Herman Miller	11/ 1/51	10493	20	Maxine Juran
				6/27/50	4489	1000	Herman Miller	11/ 6/51	10495	890 of 1100	Fox
7/20/50	3744 orig.	1000	J. M. Smoot	10/18/51	10435	100	J. M. Smoot			100 of "	
7/20/50	3744 orig.		J. M. Smoot	10/18/51	10436	100	J. M. Smoot			25 of "	
				1/28/50	3845 orig.	100	W. A. Albury			85 of "	W. A. Albury
							"	11/17/51	10514	15	
								11/ 6/51	10496	75	J. M. Smoot
						1300				1300	
				11/21/50	5918 orig.	1000	Hayward*	2/20/52	10591	400	Fox
				5/18/50	2624 orig.	50	Bev. Randall	2/20/52	10592	50	Coffey
				5/18/50	2623 orig.	25	R. W. Randall	2/20/52	10593	25 of 50	Coffey
				11/21/50	5918	1000	B & S Weinshenk			25 of "	
				1/26/51	7018 orig.	200	Hayward*	2/21/52	10594	600 of 775	Pierce
							B & S Weinshenk			175 of "	
				2/21/52	10594	775	J. Pierce	3/25/52	10608	500	Ramles
			stub dated	12/20/51				3/25/52	10609	275	J. Pierce
				3/25/52	10609	275	J. Pierce	3/26/52	10612	400	Wm. Fox
				12/14/50	6369 orig.	100	J. Smoot				
				5/18/50	2622 orig.	25	L. S. Randall				
				Total		3750				3750	

*Stub 2/21/51.

Dated 11/25/54.

JOHN PIERCE

Prepared from Journal & Ledger of Las Vegas Thoroughbred Racing Ass'n 7/21/54 by Charles R. Burr & Clifford L. Roop

Date	Preferred Ctf. No.	Pfd. Shares Orig. Issue	Name of	Date	Preferred Ctf. No.	Pfd. Shares	Name of	Date	Trace to Original Source Preferred Ctf. No.	Source Pfd. Shares	Name of
5/18/50	2484	25	Ronald Wm. Randall	2/21/52	2484	25	Ronald Wm. Randall				
5/18/50	2485	50	Beverly Randall	2/21/52	2485	50	Beverly Randall	2/21/52	9604	775	J. Pierce
11/21/50	5111	1000	E. B. or C. Hayward	2/21/52	5111	1000	E. B. or Claire Hayward	2/21/52	9605	500	Fox
1/26/51	6149	200	Bernyce & S. Weinshank	2/21/52	6149	200	Bernyce & S. Weinshank				
				3/25/52	9604	775	John Pierce	3/25/52	9615	500	Ramles
								3/25/52	9616	275	J. Pierce
5/18/50	2483	25	Lee S. Randall	3/26/52	2483	25	Lee S. Randall				
7/ 3/50	3282	100	W. A. Albury	3/26/52	3282	100	W. A. Albury	3/26/52	9618	400	Fox
					9616	275	John Pierce		9623	10	W. A. Albury
10/30/50	4497	20	May Dickinson	3/26/52	4497	20	May Dickinson		9624	10	J. Pierce

Prepared from Journal & Ledger of Las Vegas Thoroughbred Racing Ass'n Except for Pfd. Ctf. Nos. Obtained by Telephone July 28, 1954—Roop

Date	Preferred Ctf. No.	Original Issue Common Ctf. No.	No. of Shares	Original Issue in Name of	Date	Pfd. Ctf. No.	Common Ctf. No.	No. of Shares	Reissued in Name of
8/30/51	8077	8955	200	Emery	10/11/52	9708	10696	1540	W. E. or Saxon Fox
8/30/51	8078	8956	100	Emery					
1/ 2/51	5738	6596	100	Bashaw					
12/16/50	5571	6428	100	Englehart					
4/18/50	1632	1770	100	Ferguson					
6/19/50	3024	3194	100	E. Howard					
11/20/50	5032	5840	200	Landegger					
7/10/50	3352	3605	250	Mintz					
7/14/51	7426	8305	40	Mintz	9/ 2/52	9671	10659	800	M. C. or F. Ramles
12/31/50	5733	6590	250	Mintz					
8/24/51	8122	9000	50	E. Warren					
8/24/51	8123	9001	50	I. Warren					
10/ 9/50	4397	5194	200	F. A. or M. Smith					
11/ 1/50	4596	5400	300	F. A. or M. Smith					
12/21/50	5653	6510	300	F. A. or M. Smith					

CX6

(Copy)

February 21, 1952.

William B. Fox,
c/o Bank of America, Walnut Park Branch,
Santa Ana Street at Seville,
South Gate, California.

Dear Mr. Fox:

Pursuant to your request, I have herewith forwarded five hundred (500) units of the Las Vegas Thoroughbred Racing Association stock to the Bank of America. To wit:

500 Shares of Preferred stock issued to William E. Fox

400 Shares of Common stock issued to William E. Fox

50 Shares of Common stock issued to Allen M. Coffey

50 Shares of Common stock issued to Marie Coquillette Coffey

—

500 Units

I regret the delay, but it has been extremely difficult to acquire the stock.

Pursuant to our telephone conversation, I have purchased same for you at \$6.00 per unit or total \$3,000.00. I would greatly appreciate your check by return mail. Please mail your check directly to me, John Pierce, 1133 South 15th Street, Las Vegas, Nevada. I will advise you of any future develop-

ments and send you the current clippings as things progress.

I feel that the next few weeks until things are settled will be the only time that I may be able to pick up any further units. Therefore, if you or any of your friends want any additional Units, please advise me at your earliest convenience and I will attempt to purchase same for you.

With kindest regards and thanking you for your past interest, I am,

Sincerely yours,

/s/ JOHN PIERCE.

JP/pk

cc/William Fox

Ex. No. CX6 Docket No.....Title John Pierce
Date 11/23/54 by AH.

CX29

John Pierce,
1104 Clark St.,
Las Vegas, Nevada.

November 10, 1953.

Charles S. Buck, Attorney at Law,
8179 Seville Avenue,
South Gate, California.

Dear Mr. Buck:

Your letter of November 6th received and contents carefully noted. Please be advised that I

acknowledge that I owe Mr. Fox \$1,000.00. I am sincere in my efforts to repay him. Unfortunately things have happened that have caused both Mr. Fox and myself despair and money. Specifically, the immediate closing of the Las Vegas Race Track. The near future may be much brighter since there have been plans submitted to reorganize and reopen the now defunct Las Vegas Race Track. I have several thousand shares of Stock in the plant that I'm endeavoring to sell and as soon as I can move same I certainly will take care of my obligation to Mr. Fox.

Your letter suggesting that you contact the District Attorney seems somewhat ambiguous. The checks that I gave Mr. Fox were in lieu of notes for monies borrowed, they were not cashed nor were they accepted by him in that sense at all. And in addition, Mr. Fox has in his possession a Government lease for 5 acres of property currently valued at \$5,000.00 as security for the borrowed monies, at most I can see your position in a Civil suit, which would certainly forestall and possibly make repayment of the debt impossible. You can readily see that no one would be interested in Stock from any individual cited in a legal action for payment of a loan. However glamorous and active Las Vegas may be, it's still a small town. A sneeze on 1st Street clearly reverberates to 25th Street.

As I stated above and from my conversations with the principals and the Board of Directors of the

Las Vegas Race Track, I am most certain that within the next three or four weeks that Mr. Fox and I will both be happier and I should be able to meet my obligation to him in full. I am sincerely grateful for Mr. Fox's hesitancy and consideration in the past and most certainly will be grateful for your continued consideration in the future.

If I had any other tangible assets that I could liquidate, I certainly would take that course, however, I own nothing. My car is at present mortgaged for some three thousand dollars and as they say in Rome, "you can't get blood out of a turnip." Once again let me assure you that I do appreciate Mr. Fox's past consideration and your future consideration.

Very truly yours,

/s/ JOHN PIERCE.

JP/psp

Ex. No. CX29 Docket No.....Title John Pierce
Date 11/26/54 by AH.

CX 33

[Letterhead]

John Pierce Investments and Financing

March 23, 1954.

William E. Fox,
Loop Pharmacy,
8121 Seville,
South Gate, California.

Dear Mr. Fox:

I want to make some arrangement as to liquidating my debt to you. We have just moved after a long hard struggle. We are still not quite as soluble as we will be, but at least we are slowly getting on our feet again.

After checking over my obligations, I find that I can afford \$100.00 per month. I would like to send it all to you, but as you may know we also owe Fern some money. We know that she needs it quite badly and are wondering if you would agree to our paying you \$50.00 per month and her \$50.00 per month until we can erase the debt to her, then the entire \$100.00 to you until we erase that debt. Of course, if we get any sizable amount of money in from any source, I plan to liquidate your debt immediately and Fern's if it comes before that is payed up too.

You really have been most lenient and I sincerely appreciate it. Until just now, there was

simply nothing I could do to repay you. I wish it could be more now, but feel that at least this will begin to get this thing cleared up.

We have not notified Fern of our intention as yet, pending hearing from you as to whether this arrangement will be agreeable to you.

Again, my real appreciation of your patience, and with best regards to both you and Mrs. Fox, I am,

Very truly yours,

/s/ JOHN PIERCE.

JP/psp

Ex. No. CX-33 Docket No. Title John Pierce
Date 11/30/54 By FR.

CX 35

United States
Department of the Interior
Bureau of Land Management

Form 4-776
(May, 1949)

Serial No. Nevada 02346

Date: Dec. 11, 1950

Lease Under Small Tract Act

1. Pursuant to the Act of June 1, 1938 (52 Stat. 609; 43 U.S.C., sec. 682a) as amended, and subject

to valid existing rights, the regulations issued under said Act, and the terms and conditions herein set forth, the United States of America, the Lessor, represented by the Bureau of Land Management, hereby leases to Mr. John Pierce of 218 Chicago St., Las Vegas, Nevada, the Lessee, for a period of 5 years, the following-described land, to be used for homesite purposes only: subject to rights-of-way for access roads and public utilities as follows: 161½ feet along the South boundary of the tract, described as follows:

E1/2SW1/4NE1/4NW1/4, Sec. 24, T. 21 S., R. 61 E., M.D.M., Nevada, containing 5 acres.

2. The Lessee may apply for renewal of the lease, not more than 6 months nor less than 60 days prior to the expiration thereof, and, if it is determined that a new lease should be granted, will be accorded a preference right to a new lease, for such term and upon such conditions as may be fixed.

3. The Lessee may purchase the above-described land at or after the expiration of one year from the date of this lease, provided he has made the improvements herein required and has fully complied with the terms and conditions of this lease, for the amount of \$., plus the cost of survey, if necessary to describe the land properly. The application to purchase may not be filed prior to 30 days before the expiration of one year from the date hereof.

4. The Lessee agrees:

(a) To pay the Lessor, in advance, rental of \$25.00.

(b) To construct upon the land, to the satisfaction of the Regional Administrator, Bureau of Land Management, improvements appropriate for the use for which the lease is issued. Plans may be submitted to the Regional Administrator for approval in advance of construction.

(c) To observe all Federal, State, county, and other laws, regulations, and ordinances which are applicable to the premises, and to keep the premises in a neat and orderly condition.

(d) To conduct all business operations, if authorized by this lease, in an orderly manner and in accordance with all applicable Federal, State, county, and other laws, regulations, and ordinances.

(e) Not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and to require an identical provision to be included in all sub-contracts.

(f) Not to commit waste or injury to the land, or to utilize it for any purpose other than that for which this lease is issued.

(g) To take all reasonable precautions to prevent and suppress forest, brush, and grass fires and other fires that may result in damage, and to extinguish all fires before leaving the premises unattended.

(h) Not to cut timber from the leased lands

without permission from the Lessor, which will not be granted except where the cutting is to clear the lands or make improvements thereon, and not to sell any of the timber.

(i) To take all precautions to prevent pollution of waters on and in the vicinity of this tract.

(j) To observe all laws and regulations for the protection of wildlife.

(k) Not to enclose or obstruct in any manner, or erect or maintain signs or buildings on any highways, roads, or trails commonly used for public travel. Unless otherwise provided in the order classifying this land for small tract purposes, the leased land is subject to a right-of-way of not to exceed 33 feet in width along or near the edges thereof for road purposes and public utilities, which may be utilized by the Federal or State governments, or the county or municipality in which it is situated, or by any agency thereof. In the discretion of the Lessor, the right-of-way may be definitely located prior or subsequent to the issuance of patent, if the land has been classified for sale as well as for lease.

5. There is reserved to the United States all of the coal, oil, gas, and other mineral deposits in the leased land together with the right to enter upon the land and prospect for, mine, and remove such minerals. There is also reserved to the United States, pursuant to the provisions of the Act of August 1, 1946 (60 Stat. 755), all uranium, thorium, or any other materials which are or may be determined

to be essential to the production of fissionable materials, in whatever concentration, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, or remove the same.

6. Nothing contained in this lease shall restrict the acquisition, granting, or use of permits or rights-of-way under existing laws.

7. Authorized representatives of the Department of the Interior at any time shall have the right to enter the leased premises for the purpose of inspection, and Federal agents and game wardens shall at all times have the right to enter the leased area on official business.

8. This lease is subject to cancellation by the Lessor for failure of the Lessee timely to perform or observe any of the terms and conditions hereof, or of the regulations issued under the Act of June 1, 1938, where such default continues for 30 days after written notice by the Lessor.

9. Upon the cancellation or expiration of this lease, the Lessee will be allowed a reasonable time to remove his improvements from the land, or to make other disposition thereof. Upon his failure to do so, the improvements will become the property of the United States.

10. The Lessee will not assign this lease, nor sublet any portion of the premises, without prior ap-

proval of the Lessor and will not speculate in the privileges herein granted.

11. This lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties hereto.

12. No Member of, or Delegate to the Congress, or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, and no officer, agent, or employee of the Department of the Interior, shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and the provisions of Title 18, U.S.C., secs. 431-433, relating to contracts, enter into and form a part of this lease, so far as the same may be applicable.

THE UNITED STATES
OF AMERICA,

By /s/ A. L. SIMPSON,
Manager—Nevada Land
Survey Office.

/s/ JOHN PIERCE,
Lessee.

Witnesses to Signature of Lessee:

/s/ BERNADINE YOUNG,
/s/ JERMOE WENTWORTH.

Ex. No. CX-35. Docket No..... Title: John
Pierce. Date: 11/30/54. By FR.

CX 36

[Letterhead]

John Pierce, Investments and Financing

August 22, 1953.

Dear Mr. Fox:

Enclosed you will find a carbon copy of a letter I just took from John, I decided to make an extra copy to send to you and I want to ask you to do me a favor and call Mr. Lister. His phone number is Mutual-5698. I am most anxious for you to understand that this Oil Deal was as I explained on the phone and perhaps this will give you at least a little more satisfaction that it is so.

Also enclosed is my check in the amount of \$325.00 as per our conversation. Let me know about the Fischer check, for I do not want that to remain outstanding either.

I have discussed my phone call to you with John so that he now knows that I've sent you this money. For collateral for the remaining \$1000.00, you mentioned the property we have. I am enclosing the lease on this property with a diagram showing where it is. (The legal description on the lease would mean little to you having not seen where it is.)

By September 30, 1953, we will have sent you this money at which time you can return the lease. In the event that we have not sent you the \$1000.00,

naturally you may keep the lease on which we will make all necessary assignments.

Incidentally, I would like to mention that although the carbon copy of the letter enclosed states that we got a refund from the source of the stock, we didn't. John went out and borrowed the money in order to repay this man. He didn't even want to make him feel badly that he'd had to borrow the money to repay the mistake, so instead he made Mr. Lister feel that he, John, lost nothing by the deal. I mention this only to show you that even though you cannot seem to feel so, that John is actually a man of his word and if he sees a mistake, he is certainly willing to admit it. Now that Mr. Lister has been reimbursed, he certainly has a good investment, and John feels that you were able to get in on a good thing too, through his advice, and so do I.

Believe me when I say that I am glad that you were able to purchase the stock at the proper price, and although I must admit we were negligent in not checking this matter completely, John has never thought for one minute that you have made any purchase from him without a thorough check for he realizes (whether you can see it or not) that he is not as experienced, if only through an age factor, as you and has always known that in any investment you make you are thoroughly sure of yourself as to the facts. None of his deals are such that they don't bear an investigation, and it was with that thought in mind, I'm sure, that he gave you information regarding this Oil Stock Deal.

Again, let me tell you how happy I am that you were able to make the purchase as you were, and also that you informed us for it has saved us considerable trouble too.

You see, John is now on an actual deal and will definitely be able to repay you by Sept. 30 as mentioned and also at that time will have extra money with which to start us off so to speak in life. He had planned to take that stock and I am very grateful to you and so is he that we know its real value. It is certainly unfortunate that it has caused any ill-feelings, but as they say in all things there is some good and if some day you have the returns you should from that Oil Stock, well, then, perhaps it has been worth the loss of your friendship.

I must close this now for John will be returning any minute with the check for Mr. Lister to mail the letter.

We remain, and always will,

Yours very truly,

/s/ PAT & JOHN,

PAT AND JOHN PIERCE.

Ex. No. CX-36. Docket No..... Title: John
Pierce. Date: 11/30/54. By: FR.

RX-1

Santa Barbara, California.

To Whom It May Concern:

This is to certify that any and all security transactions that the undersigned has had with one John Pierce have been fully, completely and satisfactorily terminated and settled.

Dated: This 12 day of June, 1954.

/s/ EARL B. HAYWARD.

Witness:

/s/ CHARLES S. STEVENS, JR.,
Attorney at Law and Counsel
for Earl B. Hayward.

Ex. No. RX-1. Docket No..... Title: John
Pierce. Date: 11/22/54. By: W. H.

Before the Securities and Exchange Commission

In the Matter of:

JOHN PIERCE, 1021 Bracken Avenue, Las Vegas,
Nevada.

TRANSCRIPT OF HEARINGS

November 22, 1954

The above-entitled matter came on for hearing,
pursuant to notice, at 11:00 o'clock a.m.

Before: Edward C. Johnson, Examiner.

Present:

JOHN G. SOBIESKI,

EDWIN J. DOTSON,

Appearing on Behalf of John Pierce.

W. STEVENS TUCKER,

Appearing on Behalf of the Securities and
Exchange Commission.

* * *

Mr. Sobieski: If Your Honor please, ordinarily a [26*] statement of counsel is not evidence, but this statement which Mr. Tucker is about to make I am sure will be an accurate statement, and therefore I would be glad to stipulate that Your Honor may consider it as evidence unless I should object to some point of it.

Hearing Examiner: You had better wait until he makes the statement.

Mr. Sobieski: All right.

Mr. Tucker: Las Vegas Racing Corporation, a corporation, qualified for sale to members of the public, an amount to be \$2 million or \$2,500,000 of preferred and common stock sold in units of one share of common and one share of preferred.

Hearing Examiner: When was that?

Mr. Tucker: That was prior to September, 1951, and in September, 1951, proceeds of the sale were exhausted, the race track was not completed, and they needed a very considerable sum of additional money to complete the track.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

There were some stockholders' differences, extending down through the end of the year. In January, 1952, an involuntary creditors' petition was filed under Chapter X of the Bankruptcy Act in the United States District Court for Nevada. There was an answer filed, so that there was an issue joined, but by consent and some time about or in the month of March, an order was entered approving the petition, and one Thomas J. McLaughlin of Las Vegas was appointed trustee under Chapter X of the [27] Bankruptcy Act, and thereafter proceedings followed in their due course, and two plans of reorganization were submitted to the trustee.

In the fall of 1952 one of the plans was approved by the Court for submission to creditors and stockholders, and I believe that order, ordering the submission, was in November of 1952.

Following that plan was submitted to creditors and stockholders, and they voted favorably on it, it was confirmed in January or February of 1953, and all of these proceedings related to Las Vegas Thoroughbred Racing Association.

The plan provided for the formation of a successor corporation, to which the assets would be turned over in exchange for the issuance of new securities, partly in the form of bonds for new money, to the tune of \$2 million, provided by a syndicate who sponsored the plan, and partly in the form of new common stock, part of which went to the syndicate along with the bonds, the balance which was distributed to the holders of the old preferred stock, the old common stock having been

found by the Court to have been under water, no value or equity for it.

Hearing Examiner: What was the authorized capital stock issue of the company?

Mr. Tucker: I believe the authorized capitalization was about \$3 million. There was \$2 million I believe represented the preferred, there was \$500,000 of common stock; that was [28] 500,000 shares of common stock that were sold together with the preferred stock.

Hearing Examiner: Sold as a unit?

Mr. Tucker: One share and one share making a unit, one of each. And there were 500,000 shares of promotion stock issued to the promoters.

Mr. Pierce: There were a million shares of common stock, and 500,000 shares of preferred stock.

Hearing Examiner: A million and 500,000? How much of that was sold to the public?

Mr. Pierce: 500,000 units, 500,000 shares of common and 500,000 shares of preferred and that was at \$5 a share, making \$2,500,000.

Hearing Examiner: Is that your understanding?

Mr. Tucker: That's right.

Hearing Examiner: All right.

Mr. Tucker: The Las Vegas Jockey Club was a successor corporation, so you will find here an offering of shares of the Jockey Club as well as the other transactions of the Racing Association.

Ultimately the Jockey Club tried to run a racing meet. They got badly in debt, went into bankruptcy in the spring of 1954.

Mr. Pierce: And it is in bankruptcy now.

Mr. Tucker: And it is in bankruptcy now. [29]

* * *

EARL B. HAYWARD

was called as a witness, and having been first duly sworn, was examined and testified as follows: [51]

* * *

Direct Examination

By Mr. Tucker:

Q. Your name is Mr. Earl B. Hayward?

A. That's right.

Q. Where do you reside, Mr. Hayward?

A. Santa Barbara, California.

Q. How long have you resided there?

A. All my life.

Q. Are you acquainted with John Pierce of Las Vegas, Nevada, the respondent in this proceeding?

A. I am.

Q. You recognize Mr. Pierce seated here at counsel table? A. Yes, sir.

Q. Did you, during the public sale of units of Las Vegas Thoroughbred Racing Association in 1950 or 1951, buy some units of that Association?

A. Yes.

Q. How many units did you buy?

A. 3,000 shares.

Hearing Examiner: Keep your voice up a little more, so that all can hear you.

The Witness: Yes, sir.

Q. (By Mr. Tucker): Do you mean 3,000 shares

(Testimony of Earl B. Hayward.)

all together, or 1,500 preferred and 1,500 common, or do you mean 3,000 shares of [52] preferred and 3,000 shares of common?

A. Well, I bought \$15,000 worth of stock. Now, whatever that indicates, that is what I bought.

Q. And did you receive the certificates?

A. I did.

Q. For that stock? A. Yes.

Hearing Examiner: Mr. Hayward, before you get any further, tell us about yourself. What is your business?

The Witness: Well, I am 44 years old, and I have lived in Santa Barbara all my life, and I am in the floor-covering business.

Hearing Examiner: Floor-covering business?

The Witness: For the third generation.

Hearing Examiner: You must know your business.

The Witness: I do.

Q. (By Mr. Tucker): You are still engaged in that business?

A. Yes, sir. I employ about 54 men and have about 18 trucks, and we are the oldest business in Santa Barbara.

Hearing Examiner: What is that business called?

The Witness: Hayward's.

Hearing Examiner: Hayward's; I see.

Q. (By Mr. Tucker): Did you buy that stock through a salesman who came to [53] you and sold it to you?

(Testimony of Earl B. Hayward.)

A. I bought it through John Pierce, yes. I went to Las Vegas with a friend of mine. I have forgotten what year it was—1951, I believe, who was interested in race track operations, and it was through Dr. Pierson, a friend of mine in Santa Barbara, that I became interested in an investment of that type, because he was subsequently interested in a like deal, and we went over there together to look at the situation and to buy stock if we liked it, which we did, and we both bought stock at that time. I bought \$5,000 worth of it, or a thousand shares, at that time. Then later I bought subsequent stock of 2,000 shares. That is Dr. Clyde Pierson, who is in business in Santa Barbara.

Q. Do you recall receiving delivery of the stock certificates representing your purchases?

A. Yes.

Q. And do you recall that you received certificates for common stock and preferred stock?

A. That's right.

Q. And do you recall how many certificates you had of common stock and how many of preferred stock?

A. No, I don't.

Q. For the purpose of refreshing your recollection, was it not a fact that for each share of preferred you received, you received one share of common, that you had the same number [54] of each?

Q. And that the amount of stock that you did receive was 3,000 shares of preferred, and 3,000 shares of common? Does that sound correct to you?

A. I believe that is correct, yes.

(Testimony of Earl B. Hayward.)

Q. Now, subsequently——

Hearing Examiner: How much did you pay for that? \$15,000?

The Witness: That's right.

Hearing Examiner: Yes.

Q. (By Mr. Tucker): Subsequently, at or about the end of the year, 1951, or early in the year, 1952, did you have any discussion with Mr. Pierce with respect to the sale of any of your stock in that Association?

A. Well, dates don't mean a great deal to me, that long ago. Is this prior to the opening of the track?

Q. For the purpose of refreshing your recollection, I hand you Commission's Exhibit CX-1 for Identification, which purports to be a letter dated March 3, 1952, addressed to you, and signed by John Pierce.

Mr. Sobieski: May I see that for just a minute?

Mr. Tucker: Yes.

(Document handed to Mr. Sobieski by Mr. Tucker.)

Q. You recognize that as a photostatic copy of a letter [55] received by you from Mr. Pierce at or about the date appearing on the exhibit?

A. Yes, sir.

Q. Now, prior to that time had you had any discussion or talk with Mr. Pierce with respect to the sale by you of some part of your holdings of stock of Las Vegas Thoroughbred Racing Association?

(Testimony of Earl B. Hayward.)

A. Yes, I believe that I was either over there, or we were talking on the phone; he asked me if I wanted to sell any of my stock.

Q. And can you tell us as far as you can remember what was said at that time by either you or Mr. Pierce?

A. Well, merely the fact that if I was interested, he had a buyer for it. That was the gist of the conversation, and if I was interested in selling any, all or any of a portion of my stock, I could get rid of it at that time. Well, at that time I wasn't.

Q. Now, did there come a time when you did enter into some arrangements with Mr. Pierce with respect to disposing of some of your stock?

A. Yes, there was.

Q. Was that at the time of that conversation, or——

A. Later.

Q. Following that time?

A. Later, following that time. [56]

Q. And how did that occasion come about, who initiated it, you or Mr. Pierce, as far as you recall?

A. I think I did.

Q. By what means, by mail, telephone, or did you see him, again, if you can remember?

A. I think we were over there, and saw him.

Q. And will you tell us, as closely as you can recall, what the substance of that conversation was?

A. Well, the substance, the gist of the whole thing is the fact that I was interested at that time, didn't look too promising as to going through for the whole deal as it was originally explained to me,

(Testimony of Earl B. Hayward.)

and after waiting some time for it to open and it being prolonged, I thought I would get some of my money back, sure of it, be assured of it, and it would be good business to do it. So I asked him if he wouldn't take and sell some of my stock, get my money back, and he said that he could.

Hearing Examiner: I think you ought to fix the date, as near as you can, when this conversation occurred. Was it in the fall, summer, spring, and what year, now?

The Witness: Well, sir, I don't know.

Hearing Examiner: Fix it the best you can. You go to Las Vegas with regularity?

The Witness: No, sir.

Hearing Examiner: Take the witness. [57]

Q. (By Mr. Tucker): Did you reach an agreement?

A. We reached an agreement, yes.

Q. About it, with Mr. Pierce? A. Yes.

Q. Can you tell me what the agreement was?

A. Well, he was going to take——

Mr. Sobieski: May I interrupt? Is this agreement in writing, or is it verbal?

The Witness: It was a verbal agreement.

Mr. Sobieski: And can you tell us approximately when it was?

The Witness: No, I can't.

Mr. Sobieski: And who was present at the time of this verbal agreement?

The Witness: Just John and I, I think, just the two of us.

(Testimony of Earl B. Hayward.)

Mr. Sobieski: And it was in Las Vegas?

The Witness: I don't know whether—I don't recall whether it was in Las Vegas or on the phone, to be honest about it. I mean, it has been so long, and I talked to John several times on the phone, and I have been over there several times.

Mr. Tucker: We will, by connecting evidence, indicate at least the date prior to which this must have taken place, Your Honor.

Hearing Examiner: Are you sure, Mr. Hayward, that you had [58] what you term an understanding or an agreement with Mr. Pierce here with reference to the sale of some of the stock which you had previously purchased? Are you sure of that? That's all we want to know.

The Witness: Oh, yes.

Hearing Examiner: All right.

Q. (By Mr. Tucker): Now, pursuant to that agreement did you turn over to Mr. Pierce some stock? A. Yes, I did.

Mr. Sobieski: Shouldn't we first get what the agreement was?

Mr. Tucker: I am going to.

Mr. Sobieski: Oh, excuse me.

Q. (By Mr. Tucker): To the best of your recollection, what was the understanding you entered into with Mr. Pierce about disposing of this stock?

A. He was going to sell——

Hearing Examiner: What did he say to you and what did you say to him, as near as you can recall?

(Testimony of Earl B. Hayward.)

The Witness: Well, of course, I wanted as much as I could get of what I paid for it out of the stock, and—but I think, as we talked, he said, “Well, first, if I get you \$3 a share for the first 200 shares and \$4 a share for the 800 shares, [59] that’s what we will do.”

And I agreed to that, and that’s what the arrangements were that were made.

Q. (By Mr. Tucker): And was the arrangement——

A. But as I told him——

Hearing Examiner: Go ahead.

A. I would like to have gotten what I paid for it.

Well, it was not salable, I guess, or the market wasn’t there for that price. So I took what I could get.

Hearing Examiner: Now, you actually turned over the thousand shares, did you, or thousand units, as the case may be?

Mr. Pierce: Thousand shares.

Hearing Examiner: Thousand shares or thousand units?

The Witness: A thousand shares.

Mr. Pierce: Units.

The Witness: Or units.

Q. (By Mr. Tucker): A thousand each of common and preferred?

A. That’s right, \$5,000 worth, call it units or shares, I don’t know.

Q. It is what cost you \$5,000 when you bought it?

(Testimony of Earl B. Hayward.)

A. That's right, yes.

Hearing Examiner: You turned that over to him?

The Witness: Yes. [60]

Hearing Examiner: How did you send it to him?

The Witness: By mail.

Hearing Examiner: From Santa Barbara to Las Vegas?

The Witness: That's right.

Q. (By Mr. Tucker): Now, after you turned it over to Mr. Pierce, did you receive that letter marked Commission's Exhibit 1 for Identification that is on the table before you? A. Yes.

Q. Then, handing you Commission's Exhibit 2 for Identification which purports to be a letter sent to you by John Pierce on May 14, 1952, I ask you if you recognize it as a copy, photostatic copy of a letter received by you from Mr. Pierce through the mail at or about that time?

A. That's right, May 14th.

Q. Do you recall whether or not you had any conversations or any talks with Mr. Pierce between March 3, 1952, and May 14, 1952, between these two letters? A. No, I don't.

Q. Handing you what purports to be a check of John Pierce payable to you in the sum of \$800, photostatic copy of a check dated May 14, 1952, Commission's Exhibit 3 for Identification, can you tell us whether that is a photostatic copy of the check referred to in the May 14, 1952, letter?

A. Yes, I believe it is. [61]

(Testimony of Earl B. Hayward.)

Q. Now, attached to that check there is what purports to be a bank's advice to you of overcharge to your account. Can you tell us more about that check and what happened to it after you got it?

A. Well, as evidenced here, it refreshes my memory that I deposited, my wife deposited, that to our account at the bank, and it was returned "Unsufficient funds."

Q. And——

A. Which was later made good.

Q. Can you recall about when it was made good?

A. September the—in September, in 1952.

Q. Do you recall whether you received the payment referred to in Commission's Exhibit 1, the letter of March 3, 1952, in the sum of \$600?

A. Well, that is the one that catches me. I have no record of it, but—my records are very poor, I will tell you that.

Q. You may have received that?

A. I may have. If John Pierce says I did, I believe him; I would say I did.

Q. As to that one? A. Yes.

Q. Now, other than that \$600 and the \$800 that you received in September, 1952, have you received any other payments from Mr. Pierce from the proceeds of the sale of that thousand [62] units of stock?

A. Yes, as our agreement was, to pay me for my stock, was that he would pay me \$100 a month until it was paid up, **which——**

(Testimony of Earl B. Hayward.)

Q. When was that agreement made?

A. That was made in, I believe it was June.

Q. Of what year? A. Of this year, 1954.

Q. 1954? A. That's right.

Q. Mr. Pierce then came to you?

A. Yes, he did.

Q. And what did he say?

A. He said that he was having a tough time and that he knew he owed me the money and he wanted to pay, and he wasn't trying to take an advantage of me, but circumstances were such at the time that he just couldn't pay restitution to the full amount, and would I accept his note for payment of \$100 a month, until it was cleared up, and I told him I would.

Q. Do you recall what the total amount was that he agreed to pay? A. No, I don't.

Hearing Examiner: Did he give you a promissory note?

The Witness: Yes, I think he did.

Hearing Examiner: In what amount? [63]

The Witness: That I don't remember.

Q. (By Mr. Tucker): Where is it?

A. It is in my safety deposit box, in Santa Barbara.

Q. At that time did he make any payment to you? A. Yes, he did.

Q. How much did he pay you?

A. Paid me \$100.

Q. And since that time what has he paid to you?

(Testimony of Earl B. Hayward.)

A. \$100 each month. It averages \$100 each month.

Q. Well, I would like to have you give us the dates of the payments and the amounts of the payments.

A. In June he gave me \$100, and in July \$100, and in August \$100.

Q. That's \$300. Now, has he paid any more?

A. And this month, he has given me \$200.

Q. When was that? A. Today.

Q. By cash or check? A. By check.

Q. Personal check? A. Yes, sir.

Q. Now, between June of 1954 and May 14, 1952, did you make any efforts to get an accounting from Mr. Pierce for your shares of stock, or the proceeds from the sale of your shares [64] of stock?

A. Between which dates is that, sir?

Q. Between May 14, 1952, the date of Commission's Exhibit 2, and June, 1954, when he paid you \$100?

A. I think Mr. Pierce came to Santa Barbara and talked to me, stayed at Dr. Pierson's motel, and we talked about it, and it was again he said that he was having a tough time, so to speak, then I called him once, after that. I think I talked to him twice.

Q. Now, and what did he say on these occasions?

A. Well, that he was doing the best he could, and it wouldn't be too long, and that he would send me some money.

Q. Did he say whether or not he had sold the stock?

(Testimony of Earl B. Hayward.)

A. Yes, he did. He said he did sell the stock.

Hearing Examiner: When was this now?

Mr. Tucker: I was just trying to fix the date of it.

Q. (By Mr. Tucker): When did he tell you he had sold the stock?

A. Well, I don't believe whether I ever heard when he sold the stock.

Q. I mean, when did he tell you he had sold it?

A. At the time he was in Santa Barbara.

Q. And do you recall about when that was?

A. Well, that must have been in——

Q. You have testified that he made a payment to you of [65] \$800 in September.

A. In September.

Q. In 1952? A. Yes, in 1952, and——

Hearing Examiner: Was that the final payment, Mr. Hayward, or was that the \$800 in September, 1952, the payment for the bad check, or was it some other payment?

The Witness: That was the payment for the bad check, that's right.

Hearing Examiner: Mr. Tucker, you have been talking about a lot of documents here, but you don't normally have the witness do any more than describe a document before you offer it in evidence.

I would like to see, if they are going to be offered, I would like to see them.

Mr. Tucker: At this time, I would like to offer Commission's Exhibits 1, 2 and 3, as described.

Would you like to see them?

(Testimony of Earl B. Hayward.)

Mr. Sobieski: No, sir.

Hearing Examiner: You go right ahead, while I am looking at these documents. You are talking about something, and I would like to follow you.

The Witness: Yes, sir.

Hearing Examiner: You go ahead.

The Witness: The question again? [66]

Q. (By Mr. Tucker): The question was, when did Mr. Pierce tell you he had sold the stock?

A. Well, it was prior to September, in 1952.

Q. At that time did he tell you he had sold all of the stock?

A. Now, I don't know whether he said all of the stock or not, to be truthful. I don't know. But he said he sold the stock. Now——

Q. Did he ever tell you that he had sold all of the stock? A. I don't remember.

Q. Did he ever tell you of the price, as to the price at which he sold your stock? Did Mr. Pierce ever tell you? A. No.

Q. The price at which he sold your stock?

A. No.

Q. At the time that Mr. Pierce discussed with you in June, 1954, the matter of your accepting a note, did he tell you the price at which he had sold your stock? A. No.

Hearing Examiner: Mr. Hayward, you received the subpoena from the Commission, did you, to testify?

The Witness: Yes, I did.

Hearing Examiner: And on that subpoena you

(Testimony of Earl B. Hayward.)

were required [67] to bring all records in connection with the transactions, and this note resulting from the transaction which was given you in June, 1954, is that correct, June, 1954?

The Witness: That's right.

Hearing Examiner: Is in your bank now, is that right?

The Witness: Yes.

Hearing Examiner: In Santa Barbara?

The Witness: Yes.

Hearing Examiner: And you don't recall how much it is, the face amount of the note?

The Witness: No, I don't.

Hearing Examiner: How much are the payments?

The Witness: \$100 a month.

Hearing Examiner: For how long?

The Witness: Until it is paid up.

Hearing Examiner: I don't want to press you unduly.

The Witness: I understand.

Hearing Examiner: I would like to know the amount of it, if you recollect?

The Witness: I don't, really.

Mr. Tucker: May it be stipulated——

Hearing Examiner: Mr. Pierce, do you recall the amount of that note?

Mr. Pierce: Yes, \$2,200 plus interest.

Hearing Examiner: \$2,200 plus interest? [68]

The Witness: That's right.

Hearing Examiner: All right.

(Testimony of Earl B. Hayward.)

Mr. Pierce: Six per cent.

Hearing Examiner: To be paid off monthly?

The Witness: That's right.

Hearing Examiner: All right, Mr. Tucker.

Mr. Tucker: Cross-examine.

Hearing Examiner: Let me ask you one question.

Examination

By Hearing Examiner:

Q. If the note in question was \$2,200, how was that sum arrived at, do you recall?

A. No, I don't. I sort of washed my hands of the deal. What I got was gravy, after all is said and done; you know what I mean.

Q. You are not obliged to agree with any suggestions that I make. I am merely asking a few questions now.

A. That's all right.

Q. Was that \$2,200 suggested by Mr. Pierce?

A. No.

Q. It was not?

A. No.

Q. Well——

A. It was determined on—I believe, say I gave him a thousand shares, at \$3 a share, I got—and say he sold 200 [69] shares of my thousand——

Q. That was \$600?

A. Yes.

Q. All right.

A. We got that.

Q. That is what this check represents, which was dishonored on one occasion, and subsequently paid?

A. That's right.

Q. All right, go ahead.

(Testimony of Earl B. Hayward.)

A. And then for the 800 shares, we got, sold \$4 a share, so that was what he owed me, less the amount he paid me, and at the time, that was due and payable at that agreed approximate figure, plus interest.

Q. So you understand the \$2,200 represents what he owed you plus the payments of \$600 for 300 shares—for 200 shares at \$3 per unit—plus the sale of 800 units at how much? A. At \$4.

Q. At \$4 a share. Let me do a little figuring here.
Hearing Examiner: Mr. Pierce, we will swear you.

Mr. Pierce: Yes, sir.

(Witness excused.)

Whereupon,

JOHN PIERCE

was called as a witness, and having been first duly sworn, was examined and testified as follows: [70]

Examination

By Hearing Officer:

Q. Go ahead.

A. Two hundred units sold at \$3 a unit, which made \$600.

Q. That's right.

A. Then 400 units sold that I paid him for, at—I mean, 200 units sold, that I paid him \$4 a unit for.

Q. Wait a minute. You had 200 units?

A. At \$4.

(Testimony of John Pierce.)

Q. At \$3, the first 200?

A. That's right, and 200 at \$4.

Q. All right.

A. That's \$800. That's what that check represents.

Q. Which is known as Commission's Exhibit 3. All right, the total of that was \$1,400?

A. That's right.

Q. All right, now, how did we get to the note of \$2,200, subsequently agreed to?

A. Well, \$600 for 200 shares, and eight times four is thirty-two, that's \$3,200, for the balance of the stock. That would make a grand total of \$3,800. Is that right?

I gave him \$1,400 that you have evidence in checks there. That makes it \$2,400.

At the time, we made the agreement to pay it off monthly, I gave him an additional \$200. [71]

Q. And that reduced it to \$2,200?

A. \$2,200. That was the note that was left, at \$100 a month.

Hearing Examiner: Do you recall getting that additional \$200 at the time the agreement was made, Mr. Hayward?

Mr. Hayward: No, I don't, but if he says I got it, O.K. I don't remember it, though.

Hearing Examiner: What I don't quite figure, and I may not be seeing this quite right; first, Mr. Sobieski, if you want to object to my taking—I usually don't like to do this sort of thing; you have your client, you are advising him—but you said

(Testimony of John Pierce.)

first, Mr. Pierce, 200 shares at \$3 is \$600, then I thought you said 200 shares at \$4, or \$800 which this check represented.

The Witness: Yes, sir.

Mr. Sobieski: By "this check," Your Honor—

Hearing Examiner: Commission's Exhibit 3 is the check.

Q. (By Hearing Examiner): What did you say about the 800 shares at— A. At \$4.

Q. We have disposed now of 400. There is only a thousand involved. There could be only 600 left.

A. That's right.

Q. 600. Now, if that 600—now, I am not testifying now, but if that 600 was at \$4, that would be \$2,400? [72] A. Yes, sir.

Q. And if you gave \$200 additional, which Mr. Hayward doesn't recall at this time, that would reduce it down to \$2,200.

Hearing Examiner: It seems I am giving better testimony than the witnesses, Mr. Tucker. Of course, I am not testifying; I am trying to arrive at a figure.

Mr. Sobieski: Maybe that is why we have Hearing Officers, Your Honor; you come out with the facts.

Hearing Examiner: Thank you, Mr. Sobieski, but I have never been known to be a mathematician or a figurer, by any means. I have difficulty enough just reading plain law.

Mr. Hayward: What else?

Hearing Examiner: Just wait a few minutes.

(Testimony of John Pierce.)

We may have a few more questions for you. We can well understand, Mr. Hayward, that you have your business which occupies most of your time.

Mr. Hayward: That's right.

Hearing Examiner: You purchase a few shares of stock here and there, which might not be of much consequence to you.

Mr. Hayward: That's right.

Hearing Examiner: You may inquire, Mr. Sobieski.

(Witness excused.)

Whereupon,

EARL B. HAYWARD

resumed the stand, was further examined, and testified as follows:

Cross-Examination

By Mr. Sobieski:

Q. Mr. Hayward, prior to making this settlement with Mr. Pierce, you consulted with Mr. Charles S. Stevens, Jr., an attorney who practices law in Santa Barbara? A. That's right.

Q. Has Mr. Stevens represented you for quite some time? A. Yes.

Q. And you consulted, without going into the details of what you said to Mr. Stevens, prior to making this settlement, you consulted with Mr. Stevens, is that correct? A. That's right.

Q. And I show you a paper which purports to be signed by you and by Mr. Stevens, your attorney,

(Testimony of Earl B. Hayward.)

and those are the signatures of yourself and Mr. Stevens? A. That's right.

Q. And that document was executed on or about the date it bears, June 12, 1954?

A. That's right.

Mr. Sobieski: We will offer this as Respondent's Exhibit——

Hearing Examiner: It may be received as Respondent's Exhibit 1. [74]

(Respondent's Exhibit No. 1 was marked RX-1 for Identification and received in evidence.)

Q. (By Mr. Sobieski): Was Mr. Stevens present at any of the conferences that you had with Mr. Pierce on or about June 12, 1954? A. Yes.

Q. And during this time, the question of what Mr. Pierce had sold these shares for was never brought up, was it? A. No.

Q. Either by you or Mr. Stevens? A. No.

Q. And you thought, as I understand it, that you were to receive \$3 a share for 200 shares, and \$4 a share for 200 shares, is that correct?

Mr. Pierce: For 800.

The Witness: For 800.

Mr. Sobieski: Yes, that is an inadvertent error on my part.

The Witness: What was that again?

Q. (By Mr. Sobieski): You were to receive \$3 a share for 200 shares, and \$4 a share for the remaining shares, is that correct?

(Testimony of Earl B. Hayward.)

A. That is correct.

Q. So that when you received this note together with the other payments, you felt your agreement had been performed, is [75] that correct?

A. Yes.

Q. Now, as I take it, some time prior to September of 1952, Mr. Pierce talked to you either in person or over the phone, and in which he said that there would be a delay in paying you the balance of the money coming to you, but that you would ultimately be paid. Was there such a conference?

A. Yes, that's right.

Q. And what did you say to that, Mr. Hayward?

A. It was agreeable to me. I knew I would get it.

Q. You were willing to grant him the delay, is that correct? A. Oh, yes.

Mr. Tucker: What was the date of that last conversation?

The Reporter (Reading):

“* * * some time prior to September of 1952 * * *”

Q. (By Sobieski): Now, at the time that Mr. Pierce came to see you in 1954, you consulted a lawyer before making this settlement. Had you previously consulted any lawyer with reference to these transactions with Mr. Pierce? A. No.

Mr. Sobieski: No further questions.

(Testimony of Earl B. Hayward.)

Redirect Examination

By Mr. Tucker: [76]

Q. To refresh your recollection, Mr. Hayward, particularly in view of the last question, had you not, as a matter of fact, consulted Mr. Stevens about this matter prior to that time?

A. I consulted Mr. Stevens, my attorney. I don't recall, sir——

Q. About trying to collect the amount that you had coming from Mr. Pierce?

A. I don't know whether it was before or afterwards, during this time.

Q. For the purpose of refreshing your recollection I wonder if you recall a telephone conversation that you had with Mr. Burr of our Los Angeles office on or about the 5th or 6th day of May, about whether or not you had made a settlement at that time with Mr. Pierce? Do you recall Mr. Burr calling you and asking you if you had made a settlement with Mr. Pierce?

A. I remember Mr. Burr calling me. I don't recall what was said, however. If I told Mr. Burr, if you have any conversation there that I had told Mr. Burr, I am sure that is what took place.

Q. And for the purpose of refreshing your recollection——

Hearing Examiner: If you have got a copy of that conversation there, you may show it to him, for purposes of refreshing his recollection.

(Testimony of Earl B. Hayward.)

Mr. Tucker: Well, this is in the form of a memorandum of [77] Mr. Burr, in which the conversation is recorded. It is not a memorandum of the witness.

Hearing Examiner: Well, I mean, you can show that to the witness.

Mr. Sobieski: May I see it, too?

Hearing Examiner: Show it to respondent's lawyer first, and let him see that, and see if that aids and assists Mr. Hayward in knowing what occurred on that occasion.

Mr. Tucker: Yes, sir.

(Document handed to Mr. Sobieski.) [78]

Hearing Examiner: That raises another question, Mr. Sobieski. Normally, a person's recollection is refreshed in two ways. In neither way as I recall is it by showing him a document which has been prepared by someone else on the other end of the line.

Mr. Tucker: That is not the usual way of refreshing recollection.

Hearing Examiner: No, the normal method is by present recollection refreshed, or past recollection recorded; and it would be the result of initiating some action by the person whose recollection is to be refreshed, some document he may have prepared or may have had prepared under his supervision and direction at or about the time of the occurrence of the event.

Now, what we are doing here, and suggested by the Hearing Examiner—and he is occasionally wrong, of course—is that this witness might refresh

(Testimony of Earl B. Hayward.)

his recollection by looking at a document made by Mr. Burr.

Have you any views on it? This witness is not obliged to agree to anything. If this document will aid and assist him, is it proscribed by any rule of law?

Mr. Tucker: What I propose to do is ask leading questions, based on what is in the document.

Hearing Examiner: Well, all right.

Mr. Tucker: I think we may make a statement, if we may, [79] and see if it accords with the witness' recollection of the facts, that on or about May 5th or 6th, 1954, Mr. Burr had a telephone conversation with Mr. Hayward about whether or not the account had been settled, and following that telephone conversation Mr. Burr the same day received a telephone call from Mr. Charles Stevens, who is the attorney for Mr. Hayward, and that Mr. Stevens advised Mr. Burr that Mr. Hayward was in his office, and engaging Mr. Stevens in connection with the collection of this account, and Mr. Stevens then wanted to see if he could get certain information from Mr. Burr.

Hearing Examiner: What was the date of that alleged occurrence?

The Witness: May.

Hearing Examiner: May of this year?

Mr. Tucker: On or about May 5th or 6th.

Hearing Examiner: Of 1954?

Mr. Tucker: Of 1954.

(Testimony of Earl B. Hayward.)

Mr. Sobieski: Well, then, I will ask a couple of more questions.

The Witness: It must have been in April, because I was in Alaska in May.

Q. (By Mr. Tucker): This was on or about May 7, 1954. Did you not leave for Alaska immediately after that?

A. Yes, I guess that is it. I was thinking I was in [80] Alaska all of the month of May.

Q. You left within a day or so after that, it was that close, was it not?

A. Yes, it must have been, right close to that time. I was up there a month.

Mr. Tucker: Have you concluded, Mr. Sobieski?

Mr. Sobieski: No.

Recross-Examination

By Mr. Sobieski:

Q. Then Mr. Stevens never took any action at this time other than this one consultation, is that correct?

A. That's all, I think so. And writing up this form that the Judge has here.

Q. Yes.

A. On that payment deal, the agreement.

Q. And you yourself never made any complaint to the Securities and Exchange Commission, did you, Mr. Hayward? A. No.

Q. They contacted you? A. Yes.

Mr. Sobieski: No further questions.

(Testimony of Earl B. Hayward.)

Further Redirect Examination

By Mr. Tucker:

Q. With respect to this——

Hearing Examiner: You authorized your lawyer to do [81] something in connection with this account, didn't you?

The Witness: That's right.

Hearing Examiner: Was it delinquent at that time?

The Witness: Yes.

Hearing Examiner: You tell us what you authorized Mr. Stevens, your lawyer, to do in connection with this delinquent account.

The Witness: I authorized Mr. Stevens to write and find out when it was going to be taken care of.

Hearing Examiner: This is after Mr. Burr put a telephone call in to you at Santa Barbara, is that right, your best recollection?

The Witness: I don't know whether it was before or afterwards.

Hearing Examiner: All right, sir.

The Witness: Actually.

Hearing Examiner: All right, Mr. Tucker.

Mr. Tucker: Have you concluded your cross-examination?

Mr. Sobieski: Yes.

Q. (By Mr. Tucker): When it got down to this settlement after it had been going along two years

(Testimony of Earl B. Hayward.)

and nothing paid, it was at a question of taking what you could and getting it over with, was it not?

A. Yes, sir.

Q. And that was the basis on which you entered into this [82] arrangement? A. That's right.

Well, to a point, I will put it that way.

Q. To what point?

A. Well, if I wasn't going to get something that was worthwhile, I'd just as soon chuck it all. I mean, I wasn't going to give it away.

Q. Who computed the figure, the figure on which this settlement was made; did you figure that out, or did Mr. Pierce figure it out?

A. I think we both talked about it, and I agreed to it. It is simple arithmetic, as far as figuring it out and see what I could come up with on the final analysis, and I was in accord, and I agreed to the settlement on that exchange.

Q. And at that time was anything said about Mr. Pierce tell you what price he had obtained from the resale of your stock? A. No, sir.

Mr. Tucker: No further questions. [83]

Hearing Examiner: Just one further question:

Examination

By Hearing Examiner:

Q. Then between the date of March and May, 1952 and—— A. June.

Q. ——June 12, 1954——

A. Yes; I received nothing.

(Testimony of Earl B. Hayward.)

Q. You had no discussions with Mr. Pierce with reference to purchase or sale of this stock?

A. He had the stock all that time.

Q. Yes, but you——

A. You are asking me whether I got any money during that time?

Q. Yes. A. No.

Q. That's right, between May, 1952, and June 12, 1954? A. I had seen him, yes.

Q. But you didn't get any money?

A. I had been to Las Vegas, I would say two or three—twice, and seen him each time.

Q. What were you doing over there? Were you just on a visit?

A. Just on a vacation, you might say.

Q. A vacation; I see. Did you have any discussions with Mr. Pierce between these dates here with reference to the stock [84] which you had previously turned over to him, that is to say, the 1,000 units?

A. Yes.

Q. Units of stock?

A. I had asked him at different times I saw him, and it was just a rough situation, as far as his——

Q. Do you recall what he said to you other than he said it was a rough situation?

A. Not specifically, no. That is the gist of it, that he just didn't have the money, and it was——

Q. Did you know whether he owed you any money at that time? A. Sure, I did.

(Testimony of Earl B. Hayward.)

Q. How much, how did you happen to know that?

A. Because he had a thousand units of my stock.

Q. Well, he had paid you back in March and May, he had paid you——

A. For a certain amount of stock.

Q. For a certain amount? A. Yes.

Q. In other words, he had paid you \$600, and paid you \$800, too, hadn't he? A. Yes.

Q. The latter being the check, which was returned, "Insufficient funds"? [85]

A. Yes, that's right.

Q. But later, made good, in September of 1952, is that correct? A. Yes.

Q. But other than this \$800 and \$600, so to speak, had you discussed with him between May, 1952, and June, 1954, any balance that may be due you?

A. I don't believe there is any balance. I just knew that there was some money owing me, and when I did see him, I never wrote him, or called him in regard to it; it was just one of those things, when you owe somebody some money, when you see them, you put the bite on them.

Q. You knew, of course, you had turned over to him a thousand units, and did you know whether he had sold them during that period of time, or holding them or what?

A. Yes, I knew he had sold them.

Q. How did you know? A. He told me.

Q. Did he tell you how much he sold them for?

(Testimony of Earl B. Hayward.)

A. No.

Q. You didn't know how much money he owed you, I take it, is that it?

A. No, I never went—I never knew in dollars and cents, to the amount that he owed me, no, sir. I just knew he was still owing me some money, and when I would see him there, I [86] would ask him for it, and he said, “Well, just hold your horses; things will be coming along and then I will pay you.”

So that is just the way it was, and I never pressed the issue, because I believed him. I think he is honest.

Q. Well, then, in June, on June 12th when you accepted his note for \$2,200——

A. Yes.

Q. Is that the first time you knew how much was due you?

A. Oh, no, I had figured it out, but when it comes down to signing something with a definite amount, naturally I figured it out, it's just like anybody would owe you, say, \$500, and you get it back piecemeal, until you sit down and figure how much the fellow owed you during the months, you just figured he owed you some money, and when you saw him, you would say, “How about it now?” And until he paid you, you wouldn't know just how much—well, until you went back to your records and find out just how much you had marked down on the thing.

Q. This is at the risk of asking you something

(Testimony of Earl B. Hayward.)

you have already testified to, but I am sort of confused in my mind on one or two things here:

Had Mr. Pierce ever told you he had sold all of the thousand units, that you turned back to him? Had he told you during some period of time that all had been sold? A. Yes, sir.

Q. When, do you recall? [87]

A. That I don't know.

Q. Well, would it be——

A. It would be——

Q. Would it be prior to May, 1952, or would it be after May, 1952? That is when you got your check for \$800 and \$600, respectively.

A. Well, to be exact, I don't know, but I would assume that it would be around that time.

Q. Around that time? A. Yes.

Q. Did he tell you how much that he had sold?

A. He never told me how much he got for them, no.

Q. He never told you?

A. I never asked him. I wasn't interested, because I knew what our agreement was.

Q. And your agreement was what?

A. Was \$3 for the first——

Q. 200?

A. 200 shares, \$4 for the balance, which was \$4.

Q. \$800? A. Yes.

Hearing Examiner: All right, anything further, gentlemen?

Mr. Tucker: If I may see these exhibits here——

(Testimony of Earl B. Hayward.)

Further Redirect Examination
(Continued)

By Mr. Tucker: [88]

Q. Now, that figure of \$4 a share I see is referred to here in this letter of March 3, 1952.

(Document exhibited to witness.)

A. Yes, here they are, both of them (indicating).

Q. Now, then, I see here on May 4, 1952, in Commission's Exhibit 2, there is a reference to that same figure in the first paragraph. The letter says:

"I've sold 200 units of your stock at \$4.00; therefore, enclosed you will find a check in the amount of \$800.00." A. Yes.

Q. And is that figure you have in mind of \$4 a share based on the statements in those letters?

A. No, apparently we had some conversation in regard to this before I sent him the stock. This is just as I see it here, confirming our conversation, because this is written from Las Vegas to me.

Q. Well, now, as I understand your testimony, in those letters, Mr. Pierce was to sell that stock for you? A. Yes, sir.

Q. You weren't selling it to him; he was to sell it for you, is that correct? A. Yes.

Mr. Tucker: No further questions.

(Testimony of Earl B. Hayward.)

Further Recross-Examination

By Mr. Sobieski: [89]

Q. And as I understand it, your understanding with Mr. Pierce was that you were to get \$3 a share for 200 shares, and \$4 for the balance, is that correct? A. Yes.

Q. And as long as you got that amount, you were satisfied, is that correct? A. Correct.

Q. And you never asked Mr. Pierce what he sold it for? A. No.

Q. And he never told you? A. No.

Q. And you weren't interested in what he sold it for, is that correct? A. No.

Q. I think you earlier testified that you were not interested in what Mr. Pierce owed it for. Was that——

A. It finally got around to that point. At the beginning I was interested, naturally, I wanted as much as I could get for it.

Q. Yes, but——

A. Which is only good business. I mean, I would be silly to say that I wasn't.

Q. Oh, yes, that is true. Now, prior to the time you decided to sell these shares, Mr. Hayward, you had become disturbed over the developments in the track, is that correct? [90] A. Yes.

Q. So the decision to sell at this time was your decision, is that—the one that you had made?

A. That's right.

(Testimony of Earl B. Hayward.)

Q. Made from your own study of the situation?

A. My own calculation of what I had decided I had better do.

Q. Yes. A. Before it was really too late.

Q. And then——

A. I had an opportunity before to sell them. He asked me, and I didn't want to.

Q. Yes. And then subsequently what had happened in the track, can you now recall?

A. Well, it just blew up, in plain—it just didn't work. It wasn't feasible under the management to go forward, as I saw it; although it was still there, the thing was under, the track was under construction still. They still had men there, but I couldn't see how it could possibly be ready, whether due to all of the ramifications of construction, which I know a little bit about, and how far they had to go to complete the thing, complete the track, for an opening date.

Q. Yes.

A. So I drew my own opinion on the situation.

Q. Well, now, did Mr.—when you say you drew your own [91] conclusions, was this the result of your investigation independent of Mr. Pierce?

A. My own observation. I had been over there, yes.

Q. Yes. And then after that, then you had this oral arrangement with Mr. Pierce, is that correct?

A. That's right.

Q. And the oral arrangement was that you were to get \$3 for 200 shares and \$4 for the balance, is

(Testimony of Earl B. Hayward.)

that correct? A. That's right.

Q. And that was irrespective of what Mr. Pierce would get for the shares, is that correct?

A. That's right.

Mr. Sobieski: No further questions.

Further Redirect Examination

By Mr. Tucker:

Q. When was that?

A. Well, that was in 1952.

Q. With reference to the time of these letters here? A. Yes.

Q. When was it?

A. That was before those letters were written. In other words, I had a conversation with John Pierce prior to these letters. Now, I don't recall whether it was in person or on the telephone, however.

Q. What was this statement you made a while ago about [92] originally wanting to get all you could out of him? A. Yes, sir, I did.

Q. Was that in connection with your conversations with Mr. Pierce? A. Sure.

Q. When was that?

A. That was in the beginning when we discussed this, selling the thousand shares.

Q. And what was said about that, what did you say and what did Mr. Pierce say?

A. Well, I can't tell you verbatim on that. However, I thought I had better sell a thousand shares,

(Testimony of Earl B. Hayward.)

and he said it was a good idea; and that I would like to get \$5 a share for them, what I paid for them.

Now, I don't know whether Pierce said "I think I can get it for you," or "I can get it for you, I can get more for you," or not, but at one time he said he could get more for me than what I paid for them, and I told him, I recall that I told him that I wasn't interested in making a profit on them, I was interested in getting out with what I had in it.

Q. When was this?

A. But I don't know when that conversation was. I am merely making that remark. But the thing I think that is important is the fact that we did settle on an agreed amount.

Q. When did you settle on that agreed amount? [93]

A. When I sent him the shares of stock, through the mail. I sent him a thousand shares, and that was the agreement.

Q. Did you write a letter to that effect?

A. No, I didn't.

Q. What was your agreement?

A. The agreement was that I was to get \$3 for the first 200 shares, and \$4 for the balance. I believe that letter is the letter that he wrote me back, is that not right?

Q. That is the letter of March 3, 1952?

A. Yes.

Mr. Tucker: Commission's Exhibit 1.

No further redirect.

(Testimony of Earl B. Hayward.)

Examination

By Hearing Examiner:

Q. If this record can be straightened out, I will have to do so. There is some confusion in my mind, and I am not sure that the record doesn't evidence the same confusion. Whatever the facts are, is what we want. And let's spend a moment or so trying to tie some of these loose ends up, if we can.

A. Yes.

Q. I have here in my notes a statement that you said you wanted to get all you could get.

A. That's right.

Q. And that in the light of your having paid \$5 per unit [94] for this, you wanted to get your money back if you could? A. That's right.

Q. Did you tell Mr. Pierce that? A. Yes.

Q. When you sent the shares to him?

A. Now that's what I don't recall.

Q. When did you send the shares to him then?

A. I sent the shares to him prior to September.

Q. Prior to when, Mr. Hayward?

A. September of 1952.

Q. Prior to September of 1952. Well, actually here——

A. I think it was in August of 1952 that I sent him the stock.

Q. Well, now, on March 3, 1952, as shown by Commission's Exhibit 1, Mr. Pierce sent you a letter in which he enclosed, he says he enclosed a check

(Testimony of Earl B. Hayward.)

for \$600 for 200 units of stock. At that time had you sent the thousand shares to Mr. Pierce?

A. Yes, I had.

Q. So you had really sent it prior to March?

A. Yes, I had.

Q. Of 1952, hadn't you?

A. Yes, I had. Well, that is certainly obvious. Why would he be sending me a thing that he didn't have?

Q. That's what I wanted to do, straighten out the record.

Now, in May, on May 14, 1952, Commission's Exhibit 2, [95] which is a letter from Mr. Pierce from Las Vegas to you at Santa Barbara, in which among other things he says, "I've sold 200 units of your stock at \$4.00; therefore, enclosed you will find a check in the amount of \$800.00," that is the \$800 check apparently he refers to in the exhibit marked Commission's Exhibit 3 and which I am showing you at this time, is that right?

A. That's right.

Q. So prior to March and May you had sent the thousand shares through the mail from Santa Barbara over to Las Vegas, Nevada, hadn't you?

A. Yes.

Q. And was it at that time or about that time, your best recollection you told him you wanted to get all you could out of it, is that correct?

A. That is right.

Q. That is the language I have here that you used. Is it fair to say that the receipt of Commis-

(Testimony of Earl B. Hayward.)

sion's Exhibits 1, 2, and 3, being the letters that I have just shown you here and which you may see—that you thought this remittance gave you all you could get out of it?

Mr. Sobieski: If Your Honor please, may I object to the question?

Hearing Examiner: You may object.

Mr. Sobieski: I think it is leading and suggestive, and also I think it is contrary to the witness' testimony, that the [96] deal was that he was to get \$3 and \$4 regardless of what Pierce sold them for.

Hearing Examiner: I sustain the objection. I am just trying to straighten the record out here. It doesn't matter which way the record goes, just so we get a record that is straight. I have to get something that I can operate on some time, and whatever the evidence is, is what we are looking for.

Q. (By Hearing Examiner): You said something a while ago about \$3 and \$4 per share, and I have a quote here in my notes: “* * * irrespective of what Mr. Pierce was to get for the shares.” I think that was in answer to a question put to you by Mr. Sobieski, “\$3 or \$4 irrespective of what Mr. Pierce was to get for the shares.” Was that your understanding? You didn't care whether he sold them for \$10 or \$20, just so you got \$4, is that your testimony? That is all I want to know.

A. Yes.

Q. When did you come to that understanding?

A. Well, at the time that I thought they were practically—when I couldn't get my \$5 for them,

(Testimony of Earl B. Hayward.)

and stocks were not selling, I thought I was fortunate in being able to recover \$3 and \$4 for them.

Q. Can you spot that time, as to when you arrived at that conclusion? Was it in 1954, or was it in 1952?

A. It was in 1952. In 1954—you see, the agreement [97] was made in 1952, and all of this time went by and I didn't get any money. So had the stock gone up sky high, I knew that he had sold the stock; at whatever figure he had sold them, I don't know, but all I knew, our agreement was at this \$3 and \$4, and that is what I expected.

Q. In spite of that, you say, you say you wanted to get all you could get, Mr. Hayward?

A. Yes, that was my first impression, that is what my first want was, yes.

Q. Back in 1952? A. Yes, that's right.

Q. Well, you got remittances back here?

A. But I agreed to take \$3 and \$4 for them.

Q. But you got remittances back here of \$600 and \$800, respectively? A. Yes.

Q. All right, at that time had you had any agreement what you were to get? A. Yes.

Q. What was that agreement based on, if anything?

A. On the current demand of what he could——

Q. Current price of the stock, was it that?

A. Yes.

Q. Are you sure of that?

A. Well, it is what you could get, in other words, I [98] don't know what the market value of the

(Testimony of Earl B. Hayward.)

stock was, because I am not there, I don't know anything about stocks.

Q. Did the \$600 payment and the \$800 payment represent what you thought the going price of the stock was?

Mr. Sobieski: Object; leading and suggestive, Your Honor, I think he has testified definitely what the agreement was, and I think that is the story.

Hearing Examiner: Well, I want to find out——

Q. (By Hearing Examiner): I am not suggesting anything to you, but I want to find out what you knew and what you expected, if anything, at that time? A. Well, I have told you.

Q. I still don't understand.

Hearing Examiner: All right, I don't quite understand. I will let counsel go ahead.

Further Redirect Examination

(Continued)

By Mr. Tucker:

Q. Where did this \$3 figure come from and where did the \$4 figure come from? You talked with Mr. Pierce about his selling this stock for you. Now, how was that \$3 figure fixed, and how was that \$4 figure fixed?

Mr. Sobieski: Object on the ground it is immaterial.

Hearing Examiner: That is material; objection overruled. [99]

Q. (By Mr. Tucker): Were those figures sug-

(Testimony of Earl B. Hayward.)

gested by Mr. Pierce, what he could get for the stock?

Mr. Sobieski: Objected to as leading and suggestive, to his own witness.

Hearing Examiner: You may answer, if you can.

The Witness: I don't recall, actually.

Hearing Examiner: Well, I am going to be obliged to ask a question here, and a question to which Mr. Sobieski may want to object.

Examination

By Hearing Examiner:

Q. I want to find out whether the sale of the 200 units, at \$3 per unit—how was that \$3 arrived at, that's what I want. Do you recall, how was the \$3 figure arrived at?

Mr. Sobieski: Object on the grounds it is incompetent, irrelevant and immaterial in this proceeding.

Hearing Examiner: Objection overruled.

The Witness: Well, I imagine it was——

Q. (By Hearing Examiner): No, you can't imagine; don't agree to anything that is suggested. Was anything said between you and Mr. Pierce here with reference to getting the market value, the market price?

Mr. Sobieski: Objection, on the grounds it is leading and suggestive. [100]

Q. (By Hearing Examiner): All right, was anything said, was anything said in your conversa-

(Testimony of Earl B. Hayward.)

tions with Mr. Pierce with reference to getting the market price?

Mr. Sobieski: Object to that as leading and suggestive, leading the witness.

Hearing Examiner: Objection is overruled.

Q. (By Hearing Examiner): All right, what is the answer?

A. I would say that he said he could get so much for it, and I agreed to it, "O.K., let's have it. If you can get \$3 and \$4," whatever it was, and I agreed to it. It had to come from some place, that's for sure, or it is still reasonable to assume that I said, "If you can get \$3 and \$4 for this, you go ahead and sell it, and here it is."

Q. All right, but do you know you said that; we want to know about what you said, if you can spot this.

A. Honestly, I can't tell you.

Q. Yet, at one time you said you wanted all you could get out of it?

A. That's right.

Q. You wanted to get your \$5?

A. That was when this thing was—it was slipping, and that's what I wanted, yes. And then the stock didn't sell, I mean, he had it there for a while, it didn't sell, he didn't [101] find a buyer for it, and I think he called me and we talked about it again, then I was willing to get out what I could.

Q. Were you having conversations——

A. Yes.

Q. ——at that time with Mr. Pierce, with reference to the lay-out of the plant, or the prospects?

(Testimony of Earl B. Hayward.)

A. Intermittently, I had talked to him, yes. He had been to Santa Barbara and I had been over there.

Q. You said you made from your own calculations here, certain determinations or decisions; what do you mean?

A. When I decided to sell it, the fact that this track was not progressing, enough men on it and so forth, to open at the time their opening date stated; they had delayed opening it once, and had advertised it being opened at a later date, which I could not see, and that's when I decided that it was time to get out and sell some of my stock.

Q. Had Mr. Pierce said anything to you about prospects, had he discussed the looks of the situation?

A. I suppose we had talked about it, but it was my opinion to sell a portion of my stocks.

Q. Mr. Hayward, how could it possibly be your opinion, unless you knew something about that, and you went over there regularly and collected on this? You had to rely on somebody, didn't you?

A. Yes, I did. [102]

Q. You are a businessman?

A. I went over there, too.

Q. Whom did you talk to over there?

A. I went there myself.

Q. Where? A. Dr. Pierson and I.

Q. Dr. Pierson? A. Yes.

Q. Well, can you tell whether a race track is progressing as fast as it could be? A. Yes.

(Testimony of Earl B. Hayward.)

Q. Are you wised up on those things?

A. I really am.

Q. What is your background in racing?

A. Not on a race track.

Q. That is what I am speaking of.

A. No, that's true.

Mr. Tucker: Construction?

The Witness: Just construction.

Q. (By Hearing Examiner): Have you talked to Mr. Pierce or his counsel today?

A. I talked to Mr. Pierce today.

Q. About what? A. Well——

Mr. Sobieski: Object on the grounds it is immaterial, [103] Your Honor.

Mr. Tucker: I think it is proper.

Hearing Examiner: It may be, but we have to get a record one way; the fact that Mr. Sobieski substantiates respondent, I am glad to have it, but we must have a record, either for or against, and it just doesn't matter to me what the testimony is; as long as we can get something we can use, I will be delighted, if it is possible to find facts wholly in favor of your client; but I want a record.

Mr. Sobieski: It means the Commission has failed to prove their case, Your Honor.

Hearing Examiner: Yes, but there is an obligation directly thrust upon the Hearing Examiner, making a trip of several thousand miles out here and back again, to see a record is built, if one can be built, and while the primary obligation is not on

(Testimony of Earl B. Hayward.)

the Examiner by any means, nevertheless, I would like to exhaust this witness, if we possibly can—I don't mean physically, but I would like to get out of you what you know. As long as you testify to your best recollection, that is all that matters.

The Witness: All right.

Hearing Examiner: All right, any further questions?

Further Redirect Examination

(Continued)

By Mr. Tucker:

Q. You had a conversation with Mr. Pierce today about [104] this matter? A. Yes.

Q. He did pay you \$200 today? A. Yes.

Q. I ask you whether or not he made a statement to you to this effect, that in the event he was unable to get this registration he would be out of business and wouldn't be able to pay you off?

A. No, sir, he did not.

Q. Nothing of that kind to you?

A. No, sir.

Mr. Sobieski: I object.

Hearing Examiner: The answer has been given. It is all in your favor.

Did you discuss what testimony you would give here today with Mr. Pierce?

The Witness: No.

Hearing Examiner: You didn't discuss with him in any respect what you were going to say here?

The Witness: No, sir.

(Testimony of Earl B. Hayward.)

Hearing Examiner: N o one else connected with the case?

The Witness: I talked to Mr. Burr, before I came in here.

Hearing Examiner: He represents the Commission.

The Witness: Oh, yes.

Hearing Examiner: Anything further, gentlemen? [105]

Q. (By Mr. Tucker): In answer to a question by the Examiner, you said that Mr. Pierce told you he couldn't find a buyer?

A. Pardon me?

Q. I say, you made a statement just a few moments ago to the Examiner that at one point Mr. Pierce told you he couldn't find a buyer. Have I got this down incorrectly? Later, he said that he could find a buyer. Do you recall? You just said that a few minutes ago. Do you remember saying it?

A. He could not find a buyer?

Q. Yes, and then you said he later called you back and said he could find a buyer?

A. Well, I think that was relative to the stock at \$5 a share, we will put it, and later called, we were talking, that he had a buyer for \$3 and \$4.

Q. And was that when you agreed to send the stock over when he told you he had a buyer at \$3 and \$4? A. Yes.

Mr. Tucker: No further questions.

(Testimony of Earl B. Hayward.)

Further Recross-Examination

By Mr. Sobieski:

Q. Now, Mr. Hayward, you say that Dr. Pierson has had some experience with race tracks?

A. He has been interested in them, yes. I don't know how much experience, as far as owning stock. [106]

Q. I see. And did you consult with Dr. Pierson prior to making your original purchase?

A. Yes.

Q. And as I understand it, it was at Dr. Pierson's suggestion that you went to Las Vegas, is that correct?

A. That is correct, yes.

Q. And prior to going to Las Vegas at the instance of Dr. Pierson, had you ever met Mr. Pierce?

A. No.

Q. Now, with Dr. Pierson's assistance you made an investigation of the track, did you, before you purchased?

A. Yes.

Q. Then when the decision came later on in 1952 to sell—tell us what you did before arriving at that decision to sell, whom did you consult with and what investigation if anything did you make?

A. Well, I had been over there several times and it wasn't progressing as I know construction to go.

Q. Yes.

A. I mean, I am not a beginner; that is my business. I am around construction all the time, and I

(Testimony of Earl B. Hayward.)

know what has to be performed first before something else can go on. I have a pretty good idea as to how much work there was to be done at the time that they said they were going to open, and it was at that time that things didn't look too good to me, but as I went [107] back to the office of the Thoroughbred Racing Association they were going to put on, I think 85 more men the next Monday; I was there on a week end. They all assured me they were, things were going forward, and things could really be knocked out.

Q. Who assured you of these things, Mr. Hayward? Can you remember any of the people?

A. Well, John Pierce, Mr. Smoot, and Mr. John LaFortune, I mean, they were all in agreement that things were really going to get rolling. So the next time I went over, there wasn't that many men there, I couldn't see any progress in the track, and so that's when I decided the time was to get out, with what I could.

Q. And you made that decision based on your own judgment of the way things were progressing as a matter of building, is that correct?

A. That's right.

Q. And you didn't need anybody to advise you on that phase, because you consider yourself competent to make a judgment, an informed judgment, as to whether a construction job is proceeding, is that correct?

A. That's right.

Q. Now, then, at the time you had your discussions with Mr. Pierce about selling this, you had

(Testimony of Earl B. Hayward.)

known Mr. Pierce then for how long, had you known Mr. Pierce?

A. Oh, a couple of years, I guess, a year and a half, [108] about a year and a half.

Q. And at that time, as I understand it, you had the discussion with him; you are not sure whether it occurred over the phone or in Las Vegas, is that correct?

A. No, I am not sure.

Q. And was it your understanding that Mr. Pierce might make a profit in your stock, or was that discussed?

A. No.

Q. That was not discussed. And your conversation with him, as I understand it, was a flat figure of \$3 a share for some, and \$4 a share for others?

A. That was our agreement, yes.

Q. That was your agreement. And you never inquired of him what he actually sold it for, that's correct?

A. No, I don't know now what he sold it for.

Q. And you never considered it any of your business what he sold it for, is that correct?

A. Yes.

Mr. Sobieski: I have no further questions.

Hearing Examiner: Anything further, Mr. Tucker?

Mr. Tucker: Just one moment, please.

Hearing Examiner: Mr. Hayward, is this your testimony, that at no time were you concerned with what price Mr. Pierce may have gotten for the one thousand units of Thoroughbred Racing Association stock which you turned back to him? [109]

(Testimony of Earl B. Hayward.)

Mr. Sobieski: Object to that, Your Honor, on the grounds it has been asked and answered, probably a half a dozen times.

Hearing Examiner: I think you are almost right, Mr. Sobieski, but for the sake of me, I cannot fix in my mind, and I have had many years at this business, what the answer is. It just doesn't matter, as long as we get it accurate.

Mr. Sobieski: If Your Honor please, if it has been answered half a dozen times, I think that is given pretty accurately.

Hearing Examiner: I will rule on your objection. I am always reluctant not to sustain counsel's objection to a question made by the Hearing Officer, but the question, but the question has been asked in a number of forms.

Examination

By Hearing Examiner:

Q. Now, did you get my question I asked you? Do you want it read back?

The Witness: O.K., read it back.

Hearing Examiner: Read it back, Mr. Reporter.

The Reporter (Reading):

"Question, Mr. Hayward, is this your testimony, that at no time were you concerned with what price Mr. Pierce may have gotten for the one thousand units of Thoroughbred Racing Association stock which you turned back to him?" [110]

(Testimony of Earl B. Hayward.)

Q. (By Hearing Examiner): What is your answer?

A. When you say "at no time," certainly I was interested at one time.

Q. That one time was when, now?

A. That one time was when I sent him the stock; certainly I was interested in getting as much as I could for it, that is, all I wanted is what I had in it. Anything more than \$5 a share, I didn't care about, but I was interested in getting all of my \$5,000 back, but in a conversation, and I believe it was on the telephone, was that there was no buyer—I mean, it just couldn't be sold at that figure.

Q. Who said that?

A. John Pierce. And if I would take—or we agreed, I don't know whether he said "We will do that," whether I said "How much can you get for it," \$3 and \$4 was arrived at.

Q. When was that agreement arrived at?

A. That agreement was arrived upon—now, I don't remember whether it was before I sent him the stock, or afterwards, but I know there was a time after he had the stock that he hadn't sold it all. You follow me?

Q. Well, now, is this accurate or not:

After you received the \$600 check for 200 shares at \$3, and you received the \$800 check——

A. No, the agreement was before that.

A. Are you sure of that now? [111]

A. Yes, I am.

(Testimony of Earl B. Hayward.)

Q. What makes you sure of that, Mr. Hayward?

A. Because I wouldn't agree, I mean, he wouldn't arbitrarily send me an amount, without first agreeing upon it, I am sure.

Q. Well, now, are you sure of that? Are you sure of that?

A. Yes, well, I wouldn't swear to it, but——

Q. But you are under oath now, to give the best testimony you can.

A. That is what I am doing. If these things contradict that, they must be right, I must be wrong.

Q. Did you know on March 3rd when you got a letter from Mr. Pierce, in which he enclosed a check for \$600 for 200 units of this stock?

A. Yes.

Q. That he was selling it for \$3 a share, did you know that? A. Yes, I did know that.

Q. How did you know it?

A. Because we had agreed on it in our conversation, either by phone, and I believe it was by phone; or, I was going to say I was over there, but I don't believe I was, because—and talked to him. I think it was by telephone. However, he had my stock before he wrote me that letter. [112]

Q. Yes, he had your stock, because this represents a sale of a portion of it?

A. That's right.

Q. The question is——

A. And I know—I knew before he wrote that

(Testimony of Earl B. Hayward.)

letter, that I was going to get that, because that was no surprise to me.

Q. How did you know it?

A. Because we had discussed it.

Q. Where?

A. And I think it was by telephone.

Q. The sale of 200 units at \$3 per unit?

A. Yes, sir.

Q. Do you recall what transpired in this discussion? You say you think it was by telephone. Where did the—who originated it?

A. He called my office.

Q. He called your office in Santa Barbara?

A. Yes.

Q. What did he say to you and what did you say to him?

A. Well, it was just the fact that the time—he originally could get my money out of it, and I didn't want to sell it.

Q. But on this occasion, when he sold 200 units at \$3 a unit, he called you before he actually sold it, is that your testimony? [113]

A. Yes.

Q. What did he say to you?

A. That he could get me that money for it.

Q. He said he could get you \$3 per unit?

A. \$3 and \$4.

Q. He could get you \$3 and \$4 per unit, that's what he told you when he called you shortly before March 3, 1952, is that correct?

A. Yes.

Q. And what did you say to him?

A. I said, "If that's all you can get, let's sell it."

(Testimony of Earl B. Hayward.)

Q. "If that is all you can get, let's sell it"?

A. I wouldn't say those exact words, but I agreed upon it; as I said before, it was no surprise to me when the letter came with the money.

Q. Because it came back in an amount——

A. That we had agreed upon.

Q. That you had agreed upon? A. Yes.

Q. And what was the basis of that agreement, how did you happen to come to this agreement?

A. Because, I couldn't get \$5 a share for it and I was accepting less.

Q. How did you know you couldn't get \$5 a share for it?

A. Well, I believe at the time, I thought I was lucky to [114] get that.

Q. I know, but how did you know you were lucky to get that?

A. Because it didn't look like to me it would go.

Q. Where did you get your information, if you got any information, that you couldn't get \$5 a share, and agreed to this \$3 and \$4 a share, respectively? Did Mr. Pierce say anything to you about it? A. He probably did.

Q. Not probably, but what is your best recollection?

A. My best recollection was that that's what the tops was he could get for me.

Q. That is——

A. And I wanted to get, sell it, better take that for it. Now, I mean there is no—something would have to be said. If I said——

(Testimony of Earl B. Hayward.)

Q. Something would have to be said by whom, by Mr. Pierce? A. Yes.

Q. You agreed to take \$3 and \$4 a share dollars per unit?

A. Yes, he was the fellow who was selling it; I wasn't selling it.

Q. Well, did you know what these units were being sold for in the market at that time?

A. No. [115]

Q. You didn't know? A. No, I didn't know.

Q. Well, where were you looking, so to speak, for information, with reference to going prices, going values; were you looking any place?

A. No place; I run a business.

Q. Were you relying on Mr. Pierce to give you a figure that was fair and reasonable?

A. That's right. That's exactly what I thought. I bought them from him, no reason to doubt his integrity up to that point, and he was—and I had—as a matter of fact, offered to give him all my stock and let him sell it.

Q. You had full faith and trust and confidence in him, did you? A. Yes, I did.

Hearing Examiner: Any further questions?

Further Redirect Examination

By Mr. Tucker:

Q. Did Mr. Pierce say anything to you to indicate what business he was engaged in at that time?

A. At which time?

(Testimony of Earl B. Hayward.)

Q. The time he took these securities to sell for you.

A. No, never asked him.

Mr. Tucker: No further questions. [116]

Q. (By Mr. Sobieski): Mr. Hayward, with reference to these things you have testified to, you earlier said that you did not ask Mr. Pierce what he had sold the shares for, and you didn't consider that as part of your business; that you had made a deal at \$3 and \$4, is that correct?

A. That's right.

Q. Well, now, do you intend any of the answers which you have given to the Trial Examiner's questions, do you intend any of those answers to change your testimony at all with respect to the fact that you didn't consider it was your business as to what Mr. Pierce sold the stock for?

A. No, I haven't changed my opinion on that.

Q. And, therefore, your thinking still is that, as long as you got \$3 and \$4 you were saved; that was your deal; is that correct?

A. That's correct.

Q. Regardless of the fact that Mr. Pierce may have been able to sell them or did sell them at more than \$3 or \$4, is that correct?

A. Yes.

Q. And you don't want any of your answers to the Trial Examiner's questions to be construed as changing that, because your deal with Mr. Pierce didn't depend on what Mr. Pierce could resell them for; is that correct? [117]

A. That's right.

Q. If anyone should draw the inference that Mr. Pierce said that he was only getting \$3 or \$4 a share

(Testimony of Earl B. Hayward.)

for these, that would be a false inference, wouldn't it?

Hearing Examiner: What is that question?

Read it back, Mr. Reporter.

(Question read.)

Q. (By Mr. Sobieski): Did you understand the question, or shall I rephrase it?

A. Go ahead, rephrase it. I think I know it, but——

Q. Did you think that Mr. Pierce was perhaps going to make a little something on this transaction himself, being a businessman yourself, Mr. Hayward?

A. I never thought about it.

Q. But you are clear that Mr. Pierce did not represent to you that \$3 or \$4 was all that he would sell them for?

A. Well, when he told me that's all he could get for them, I assumed that, you might say, yes.

Q. Well, did you say that you had made a deal?

A. That I had made the deal, so that point didn't come up, because I was going to get—I was going to sell the stock, and I got paid \$3 and \$4, it would be acceptable to me.

Q. Well, when you say that you didn't consider it any of your business if he got more than that, if you had had a deal [118] with him that was what he was going to sell them for, wouldn't it be your business if he got more than that?

A. You might say that it was and it wasn't. In one sense it was and again it wasn't

(Testimony of Earl B. Hayward.)

Q. How is that, Mr. Hayward?

A. Well, in the agreement—I mean in the beginning I wanted to get as much as I could for the stock.

Q. Yes.

A. And then I sent him the stock and he couldn't sell it for that, so it was a lesser amount, and I agreed upon the \$3 and \$4, but I would have liked to have had my \$5.

Q. Yes.

A. So I say again, that that is just the way I looked at it; in the beginning that is what I wanted, and I found out I couldn't get it, I was agreeable to take less.

Q. Did you make any efforts to sell it through any other——

A. No.

Q. ——place?

A. No.

Q. Did you inquire what the market was?

A. No.

Q. Well, now, earlier this afternoon you told us, Mr. Hayward, that your recollection of this matter was somewhat hazy. We have asked you a lot of detailed questions about it.

A. Yes. [119]

Q. And is most of this your actual recollection or is part of it your recollection plus your reconstruction of what probably happened?

A. Well, I would say, talking about all these things, it is a matter of recalling, one thing recalls another.

Q. Yes.

(Testimony of Earl B. Hayward.)

A. But I don't think you have asked me any difficult questions.

Q. Yes. Well, now, in connection with this sale, as I understand it, did you believe that Mr. Pierce was going to act without any compensation whatever in selling this stock?

A. Well, actually, that never—it never occurred to me, outside of the fact that I had bought the stock, and it was just a courtesy for him to sell my stock. That's the way I looked at it, and I was going to give them to him to have him sell them, and I assumed that he would get as much as he could get for them, leaving it entirely up to him. After all, I had given him the stock, signed it over to him, hadn't got a receipt for it or a thing.

Now, how much faith can you put in anyone? I gave him \$5,000 and actually I didn't get anything for it.

Q. You just had the certificates, is that right?

A. I gave him all the certificates; I gave him everything, and I signed it over to him. I mean, I think that he is honest and I think that he was going to treat me—I mean, [120] I had known him long enough, and I think I did know him.

Q. Yes.

A. I had nothing. I sent them in the mail, not registered—yes, I guess I sent them registered; however, that doesn't tell you what is in an envelope.

Q. That's right. But, of course, when he wrote you a letter, that was a receipt, I presume, in a way. But, as I understand it, you had two deals. First

(Testimony of Earl B. Hayward.)

he said he could get \$5 a share for you; first he said he could get more than you put him; wasn't that correct? A. Yes, that is correct.

Q. At that time you said you didn't want to sell?

A. Yes, right.

Q. Then later on, without any urging from him, you decided you did want to sell? A. Yes.

Q. And you sent these shares over?

A. That's right.

Q. And he told you that he couldn't make a deal for \$5 a share? A. Yes.

Q. Is that correct? And you did, however, as a result of a conversation with him, make a deal to sell them at \$3 and \$4?

A. Respectively, that's correct. [121]

Q. Now, you told me earlier that at that time you didn't consider it important as to what he sold those shares for, as long as you got \$3 and \$4 a share? A. That's right.

Q. And was that the actual understanding, that as long as you got \$3 and \$4 a share it didn't matter to you what Pierce sold them for; is that correct?

A. That is correct.

Q. That is still your understanding of the situation, is that correct? A. That's correct.

Mr. Sobieski: No further questions.

(Testimony of Earl B. Hayward.)

Further Redirect Examination

By Mr. Tucker:

Q. Is that because you felt that when you agreed that he could sell them for that price, you consented to his selling for that price you told us, that you have described here, that you felt you had committed yourself; is that the reason?

A. Well, I committed myself, and my word is my bond. On the other hand, that's all I thought. As a matter of fact, I didn't think how he was going to sell those, but in the condition the tract was in—but he did sell them. and that was our agreement, and that is what I expected.

Q. Now, referring to this letter of May 14, 1952, in which it says, "I hope to move the balance of 600 units of your [122] stock very shortly——"

A. Yes.

Q. Now, had you known at that time—well, let's just assume at that time that—and this is just an assumption—that you had information to the effect that Mr. Pierce had sold, say, the first units at \$6 a share; would you have considered yourself committed to this price of \$4 a share for the remaining 600 units?

Mr. Sobieski: Object as hypothetical and argumentative.

Hearing Examiner: Are you going to be able to show that his stocks at that time had been sold at \$6 a share?

(Testimony of Earl B. Hayward.)

Mr. Tucker: I expect to do so.

Mr. Sobieski: I don't think so.

Hearing Examiner: On that assurance, you may answer the question. Have you got the question, Mr. Hayward?

The Witness: Yes, sir.

Hearing Examiner: All right.

The Witness: Well, that's a hard question to answer, in lieu of the fact that I had been losing money, and if there was a possibility of picking up more money, I would have liked to, certainly.

Does that answer your question?

Q. (By Mr. Tucker): I notice here he says he still has 600 shares he is going to sell for you in the future, and my question is, if you [123] had conversation at that time that——

A. I didn't have that information.

Q. I know you didn't have. But I am trying to find out as much as we can about this understanding you had at \$4 a share.

Hearing Examiner: He has answered that.

Mr. Tucker: All right, your Honor. Thank you. No further questions.

Mr. Sobieski: No further questions.

Hearing Examiner: Mr. Hayward, thank you very much. We are sorry to hold you over here unduly.

The Witness: Thank you.

(Witness excused.) [124]

CHARLES R. BURR

was called as a witness, and having been first duly sworn, was examined and testified as follows: [127]

* * *

Voir Dire Examination

By Mr. Sobieski:

Q. With respect to this exhibit, Mr. Burr, Exhibit 5 for identification, that purports to show that certain shares were transferred from one certificate to another certificate in various cases. Did your examination show who it was that directed that that certificate in each case, that the transfers were made? [139]

A. No, I made no examination to ascertain how that particular certificate got to the transfer agent.

Mr. Tucker: It must be recognized that the order of proof, of course, is piecemeal and we can't always have the cart and horse properly in front of each other and we must proceed with other evidence that will relate to some of these transactions not presently in the record.

Mr. Sobieski: We will, the respondent objects at this time to Exhibit No. 5 on the grounds that there has been no proper foundation laid, that it is incomplete and selective list and that the books on which it is based are not available for cross-examination at this time.

Mr. Tucker: We will submit Mr. Burr for cross-examination in Las Vegas if so requested.

Hearing Examiner: I think our discussion cov-

(Testimony of Charles R. Burr.)

ered most of that. I observe that that is a good objection. That is, in the ordinary course of events that even though these transactions with no showing of the complete transaction, even though called for the purpose of showing what is alleged to be violations by the staff of the Commission, that wouldn't disqualify the document. I don't think the staff has an obligation thrust upon it to show the complete full transactions where, presumably, many of the transactions, if there were additional transactions, may be quite in order. I think there has been sufficient showing to justify the reception in evidence and [140] the objection will be overruled and the document will be received.

(Commission's Exhibit No. CX-5 was received in evidence.)

Direct Examination

(Continued)

By Mr. Tucker:

Q. Please explain, now, what the columnar headings referred to on the first page, Mr. Burr.

A. Reading from the left of the first sheet, having to do with common shares, shows the date of the original issuance of certificates. The second column shows the certificate number. The third column, the number of shares.

Hearing Examiner: I don't think it is necessary to read all that into evidence.

Q. (By Mr. Tucker): There is one column, the fifth column that should be explained. What is the

(Testimony of Charles R. Burr.)

significance of the date appearing in the fifth column?

A. That is the date of the original issuance of the certificate, number follows, which certificate number 4489 refers to 1,000 common promotion shares issued to Herman Miller, June 27, 1950.

Hearing Examiner: Did certain of these shares have to be registered and certain not have to be registered?

The Witness: Yes. [141]

Hearing Examiner: Which had to be registered?

The Witness: The ones publicly offered and certain of promotion shares issued to the principal promoter were registered in order that he be in a position to use them in promoting the funds for the track.

Q. (By Mr. Tucker): Now, will you refer to the page of that exhibit which is captioned——

Mr. Sobieski: If I may make a comment, if any point is to be made that shares were being unregistered, I don't think there is anything in the Order for hearing that charges people being unregistered and that is certainly something peculiarly within the knowledge of the Commission and if we are to be charged with it, we certainly ought to have a little notice on that point so I object to this exhibit being used for any such purpose as that as being outside the issues in the case.

Mr. Tucker: That is not the purpose that we have. That is an incidental matter that comes in incidentally.

(Testimony of Charles R. Burr.)

Hearing Examiner: Perhaps I provoked the answer and if so, it's——

Mr. Sobieski: Incidentally or not, I object to it being used against the respondent unless he has notice of the charge.

Hearing Examiner: It will not be used at all, that portion.

If there is anything else, Mr. Tucker, in this document [142] that requires explanation, I think that is very well, but the obvious things here, you needn't touch on.

Mr. Tucker: I want to go down to explain it now. That is what I have in mind, your Honor.

Q. (By Mr. Tucker): Mr. Burr, will you turn to the page captioned "Prepared from Journal and Ledger of Las Vegas Thoroughbred Racing Association, 72154 by Charles R. Burr and Clifford L. Roop." Now, does that reflect certain transfers of preferred shares of the Association?

A. Yes, it does.

Q. Now, is there anything in that to indicate what the records of the Association show with respect to the time of the surrender for cancellation of any shares? A. Yes, dates.

Q. Where is that on this exhibit?

A. Well, reading from the right to the left, on February 21, 1952, Certificate 9605 was issued for 500 shares in the name of Mr. Fox. That certificate was transferred from Certificate No. 5111, registered, recorded in the name E. B. and C. Hayward

(Testimony of Charles R. Burr.)

which certificate had been issued on November 21, 1950, as an original issuance.

Q. What is the significance of the column of dates immediately following—I will go by number—the fifth column? [143]

A. Well, that is the date of the transfer of the certificate recorded in the name Earl B. Hayward.

Q. So that that column shows the record date of transfer of the certificates described in the first four columns? A. That's right.

Q. If I understand you correctly, then, Certificate No. 5111 for a thousand shares of preferred stock issued in the name of E. B. or C. Hayward, originally issued November 21, 1950, was transferred to February 21, 1952, is that correct?

A. That's correct.

Q. Now, on that same date were certain other certificates transferred?

A. Yes, total of 1275 shares were transferred. Those 1275 shares were represented by four separate certificates.

Q. Those are the first four on the schedule, is that correct? A. Right.

Q. Being those to Randolph—

A. Hayward and Weinshenk.

Q. Now, does this exhibit reflect what certificates were issued against that transfer? A. Yes.

Q. Where does that appear?

A. In the last two, the last three columns, the number of the new certificate and the number of

(Testimony of Charles R. Burr.)

shares and the name [144] of the person to whom the new certificate was issued in each case.

Q. What are the certificates then as shown on this exhibit that were issued against the 1275 shares transferred on that date?

A. Certificate 9604 was issued in the name of J. Pierce for 775 shares and Certificate 9605 was issued to Mr. Fox for 500 shares.

Q. Do you have further information about the name of this Mr. Fox to whom that was issued?

A. I don't have the further information on this schedule but——

Q. Have you talked to a Mr. Fox?

A. Yes, and talked with Mr. Fox and have seen Certificate 9605.

Q. In his possession? A. His possession.

Q. That is Mr. William Fox whom we expect to have here as a witness? A. That's correct.

Q. What does this schedule show with respect to the disposition made of Certificate No. 9604 for 775 preferred shares to J. Pierce?

A. That certificate issued February 21, 1952, was thereafter on March 25, 1952, transferred 500 shares to Ramlos [145] and the remaining 275 shares to Pierce, the certificate Ramlos being Certificate 9615 and 275 shares to Pierce being Certificate 9616.

Q. In the course of your investigation did you interview Ramlos? A. Yes, I did.

Q. Did you see Certificate 9615 in the possession of Ramlos?

(Testimony of Charles R. Burr.)

A. No, I did not see the actual certificate in the course of my talk with Mrs. Ramlos.

Mr. Tucker: We expect to call Mrs. Ramlos as a witness, Your Honor.

Q. (By Mr. Tucker): Now, what does this schedule show with respect to the disposition made of Certificate No. 9616 issued March 25, 1952, for 275 shares to Mr. Pierce?

A. That certificate issued March 25, 1952, was on the following day transferred along with other certificates totaling 420 shares as follows: 400 shares to Fox in Certificate 9618, 10 shares to W. A. Albury, Certificate 9623 and 10 shares to J. Pierce, Certificate 9624.

Q. In other words a block consisting of 420 shares standing in the names of Randall, Albury, Pierce and Dickinson was then surrendered and in exchange for two groups of certificates there were issued the three you have just described? [146]

A. That is correct.

Q. It is your understanding that the stock of this company was sold in units consisting of common and preferred stock?

A. At par, par value of the preferred being \$4.95 and common five cents par.

Q. And when originally sold in connection with original distribution, it was sold at \$5.00 per unit consisting of one share of preferred and one share of common, is that correct?

A. That's correct.

Q. Under the Prospectus previously introduced?

(Testimony of Charles R. Burr.)

A. Yes.

Q. Will you refer to the page of this exhibit that reflects transfers of the companion common stock that matched the preferred stock in these transactions? I believe the lower half of the page captioned "Prepared from Journal and Ledger and Certificate Stubs and Certificates of Las Vegas Thoroughbred Racing Association Records, 72154" reflects the information I want.

A. The third page of this?

Q. Yes, the lower half of the page after the total 1300. Does that show the surrender of a certificate issued in the name of Hayward in the sum of a thousand shares No. 5918 originally issued November 21, 1950? [147]

A. Yes, it does.

Q. And when was that, what do the answers on the book show about that certificate?

A. That certificate was transferred on February 20, 1952, 400 to Fox and 600 to Pierce, the 600 to Pierce being shown on the records of the Association under date of February 21, apparently an error in the Association's dating of the item. The transfer then made was somewhat involved. The Hayward certificate, a certificate for 50 shares in the name of Randall, a certificate for 25 shares in the name of Randall, and a certificate for 200 shares in the name of Weinschenk, all being involved in the transfer. The transfer being to Mr. Fox, 400 shares; Mr. and Mrs. Coffee, 100 shares——

Mr. Sobieski: Your Honor, I'm a little confused and perhaps Mr. Burr can straighten it out so we

(Testimony of Charles R. Burr.)

can understand it. Does that mean Mr. Fox got 800 shares? You previously stated Mr. Fox got 400 shares, I thought, from the 1000 shares?

The Witness: No, I'm summarizing the whole transfer that occurred on February 20 or, possibly, February 21, as one of the certificates is dated.

Mr. Sobieski: As I understand it, 400 went to Fox and 600 to Pierce. That would take care of the thousand from Hayward?

The Witness: Yes, that is true, but involved in the transfer occurring on that date, also, are certificates in the [148] name of Randall and Weinshenk.

Q. (By Mr. Tucker): Would this explain it, Mr. Burr, that there were surrendered for transfer on that date certificates aggregating——

A. 1275 shares.

Q. ——1275 shares including 1000 shares of Mr. Hayward's? A. That's correct.

Q. And that out of those certificates on that date there were issued a certificate for 400 shares to Mr. Hayward being 10591?

A. That is to Mr. Fox.

Q. I mean to Mr. Fox being 10951——

Hearing Examiner: Not 10951.

Mr. Tucker: 10591, and Certificate 10592 for certificate shares to Coffee and Certificate No. 10593, also, for 50 shares to Coffee and Certificate No. 10594 for 775 shares to Pierce?

The Witness: That's correct.

(Testimony of Charles R. Burr.)

Q. (By Mr. Tucker): Is that a correct summary of transactions reflected by this exhibit?

A. Yes.

Q. So there were certificates reflecting 1275 shares resaved and a total of certificates just described issued to Fox, the two Coffees and Pierce is 1275 shares? [149] A. Correct.

Q. Does the exhibit further reflect the disposition of Certificate 10594 for 475 shares issued to Mr. Pierce on that date?

A. Yes, on March 25, 1952, that certificate was transferred 500 shares being reissued in the name Ramlos and Certificate 10608 and the balance, 275, being reissued in the name of Pierce, Certificate 10609.

Q. Now, then, does this exhibit further reflect the disposition of Certificate No. 10609 for 275 shares issued to Mr. Pierce? A. Yes.

Q. What became of that?

A. That certificate was combined with Certificate No. 6369 for 100 shares and 2622 for 25 shares in the names of Smoot and Randall, respectively.

Q. How much does that total?

A. Making a total of 400 shares and those 400 shares were issued in Certificate 10612 in the name of William Fox.

Q. And the date and record of that?

A. March 26, 1952.

Q. So that according to this, the preferred and common shares of Earl Hayward reflected by the two certificates previously described, to wit, 5918

(Testimony of Charles R. Burr.)

for a thousand shares of common stock and 5111 for a thousand shares of preferred stock, [150] those certificates originally transferred February 21, 1952, and out of them, 500 of preferred and 400 of common went to Mr. Fox and that by March 26, all of the stock derived from Certificates No., Hayward certificates above describes a thousand shares, each had been transferred out on the books of Las Vegas Thoroughbred Racing Association?

Mr. Sobieski: Objection, complex, compound, calls for a conclusion of the witness.

Hearing Examiner: It may be all of that. I got to have somebody to summarize it and I want the reporter to read it back and see if we can't. I want to get the full meaning of it and see if Mr. Burr can answer the question on it.

Mr. Tucker: May I restate it? I may be able to simplify it.

Q. (By Mr. Tucker): Does this exhibit demonstrate, Mr. Burr, that by March 26, 1952, all of the Hayward stock, common, preferred, a thousand shares of each had been transferred on the books into other certificates? A. Yes, that is correct.

Q. And that on February 21, 1952, that stock was originally surrendered for transfer and the first certificate out of it was issued against it?

A. That's correct. [151]

* * *

Q. Was there another occasion when you discussed with Mr. Pierce the matter of his registration with the Commission as a broker-dealer?

(Testimony of Charles R. Burr.)

A. Yes, the next occasion that I recall was when I called at his home on, I believe, May 15, 1952, in the meantime, a number of transactions affected by him having come to our attention and some inquiry with reference to them having been made.

Q. And what was said on that occasion and who was present?

A. Mrs. Pierce in addition to Mr. Pierce and I was [260] present. At least, part of the time. I'm not certain she was present throughout the discussion. And in the living room of his home, then, on, I believe, Bracken Street, or Avenue, Las Vegas, the conversation was brief.

I told them that it appeared very definitely, the information I had as to transactions he had been effecting and the manner in which he had been operating, that he should register with the Commission as a broker-dealer and as to why he hadn't done so. He said he was trading on his own account; he did not feel that registration was necessary, but he had no objection to registration and would apply.

I offered, or he requested that I send him forms of application, which I did when I returned to Los Angeles within a day or two thereafter.

Q. Were any other subjects discussed at that conference? A. Not that I recall.

Q. When was the next time that you discussed the matter with him?

A. Next time I recall was in the course of one of the Chapter 10 proceedings in the corridor of

(Testimony of Charles R. Burr.)

the second floor of the Federal Building during a brief recess.

Q. Was there anyone beside Mr. Pierce present at that conversation? A. There was not.

Q. What was said? [261]

A. I called his attention to the fact——

Mr. Sobieski: Give the approximate date of this.

The Witness: Yes, October, I believe, the 8th of October, 1952.

I stated to him in substance that I knew he had not registered and couldn't understand why he had disregarded the statements that had been made to him by both Mr. LaFortune and me. And he said that he didn't think his registration was necessary and I think, if my recollection serves me correctly, that it was on this occasion that he said that his belief was that registration was unnecessary and that was, at least, partially borne out by the fact that the Commission had taken no action, notwithstanding my repeated statements to the effect that he should, ought to register. He said that he had dealt exclusively for his own account and he still believed registration was not necessary.

I asked him if he hadn't in certain transactions dealt as agent for others and he said he had not.

I said, "Now, is that true as to the transactions effected with Mr. Hayward of Santa Barbara?"

To which he replied, "I may have slipped up in that one instance."

Q. Was there any further discussion of the Hayward transaction at that time that you recall?

(Testimony of Charles R. Burr.)

A. Well, my notes would show. It may have been on that [262] occasion that he advised me he had settled his account with Mr. Hayward. I believe it was on that occasion. It was either then—yes, I'm sure that it was on that occasion that he said he had, in any event, settled his account with Mr. Hayward which occasioned one of my subsequent telephone calls to Mr. Hayward.

That is all I recall of the discussion.

Q. Did you see him again in the spring of 1953?

A. Yes, chance meeting on Third Street just north of Fremont almost in front of the office of Kalmanir Kline & Company, a then registered broker-dealer firm of Las Vegas. A brief conversation. Mr. Pierce was——

Mr. Sobieski: When was this?

The Witness: This was, I can't find any written memorandum of it. I fix the time as approximately the spring of 1953. It was casual and the conversation was brief and to the effect that his conversation being to the effect that he doubted necessity for registration and, also, stated on this occasion that there was another reason why he hadn't registered, that reason being he was uncertain as to whether he would remain in the business.

Q. (By Mr. Tucker): Now, in any of these conferences, did you discuss in some detail the use of the mails in interstate commerce and so forth in effecting transactions; in other words, did you [263] undertake to spell out to him the provisions of Section 15?

(Testimony of Charles R. Burr.)

Mr. Sobieski: I object on the ground it is leading and suggestive.

Hearing Examiner: Well, I think the witness can testify as to what he actually said and did on that occasion.

What transpired between you and Mr. Pierce?

The Witness: It was spelled out very definitely upon the first, the occasion of the first discussion I had. The date of which I fixed as early in September of 1951 and in Mr. LaFortune's office, in his presence.

Mr. Sobieski: I move to strike the answer as not responsive and calling for the conclusion of the witness.

Q. (By Mr. Tucker): Can you tell us what you told him on that occasion?

Hearing Examiner: What was immediately preceding?

(The answer was read.)

Hearing Examiner: The motion to strike is granted.

Q. (By Mr. Tucker): What did you say to him on that occasion, Mr. Burr?

A. I don't recall except that in substance he was told not to transact business and securities not purely interstate which would require his registration and that the extent of the distribution of the race track securities which had some 6,000 more shareholders was generally referred to.

Q. After the spring of 1953 was there again

(Testimony of Charles R. Burr.)

any [264] discussion between you and Mr. Pierce about the matter of registration with the Commission? A. After?

Q. The spring of 1953?

A. I think the next occasion was about May this year when he called at our office.

Q. What was the discussion at that time?

A. At that time he had with him and delivered to me an executed form BD or 3M, I don't know which form, whether form BD had been adopted at that time, but the form had been executed and he left it with me for mailing.

He asked me whether in my opinion the Commission would permit his registration to become effective. I asked him whether he had settled his account with Mr. Hayward, and he replied that he had, that it had taken him some time to settle it, but he had finished, finally accomplished that, and Mr. Hayward had been paid in full.

Incidentally, I think I have testified that this was the last conversation I had, I had this conversation in my hotel room in Las Vegas during the course of which Mr. Pierce said he did not recall having told me that he had paid Mr. Hayward in full, which he said that he did recall having told me that he had settled with Mr. Hayward. He said he told me that because he intended to settle with him.

To return to the conversation of May of this year in our [265] office, in answer to his question whether the Commission would permit his registration to become effective and following his statement as to hav-

(Testimony of Charles R. Burr.)

ing settled with Mr. Hayward, I stated to Mr. Pierce that I couldn't speak for the Commission, didn't know what the Commission would do but that I would forward the application without adverse recommendation.

Hearing Examiner: Is that 3M or BD?

The Witness: BD is the form now.

Hearing Examiner: Application for registration?

The Witness: Yes. [266]

* * *

WILLIAM E. FOX

was called as a witness for and on behalf of the Commission and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tucker:

Q. Your name is William E. Fox?

A. Yes.

Q. Where do you reside, Mr. Fox?

A. South Gate.

Q. What is your business?

A. Pharmacist.

Q. How long have you been engaged in this business?

A. Fifty years.

Hearing Examiner: How long, 50 years?

The Witness: Yes.

Q. (By Mr. Tucker): Are you acquainted with

(Testimony of William E. Fox.)

Mr. John Pierce? A. Yes.

Q. Have you had any transactions with Mr. John Pierce in connection with the purchase or sale of securities? A. Yes, I have.

Q. When was the first time you became acquainted with [275] Mr. Pierce?

A. I have to give approximate dates as closely as I can. It's been three years. I think it was the latter part of 1951.

Q. How did you first become acquainted with Mr. Pierce?

A. Well, some friends of mine came through Las Vegas and noticed the race track and so forth and they came home and talked to us about it and wondered if we should all buy a little stock in it. So we did, made a trip to Las Vegas for the purpose of buying some stock and it is on that trip that I met Mr. Pierce.

Q. Where did you meet him?

A. I don't know. I think it was the Thunderbird Hotel.

Q. How did you happen to get hold of Mr. Pierce about that matter, can you explain that?

A. We inquired around regarding the management of the track, proposed track, at that time and in the course of our examination, why, Mr. Pierce's name was offered to us.

Q. Can you recall the approximate date when you saw Mr. Pierce about this?

A. I think it was November of '51.

(Testimony of William E. Fox.)

Q. Do you have any records that would refresh your recollection as to the approximate date?

A. Well, the first check which I gave to the bank for the purchase of the first batch of stock, I think it's dated November, isn't it? [276]

Q. I'm handing you a check. Is that the one you refer to? A. I think that is it, yes.

Q. Did you——

A. It's possible it was October when we were out there because this was a little time coming down.

Q. Did you talk to him more than once about this stock? A. Yes.

Q. Before you bought some?

A. I think so.

Q. Now, with reference to your talk with Mr. Pierce, you said some friends were with you. Who were those friends? A. Mr. and Mrs. Ramlos.

Q. Were they with you when you talked to Mr. Pierce? A. Yes, they were.

Q. You believe you saw him at the Thunderbird Hotel the first time?

A. I think that is where the meeting occurred, I think so.

Q. Was anybody else present when you talked to Mr. Pierce at that time?

A. It occurs to me that the first meeting was with Mr. Ramlos and he. I don't think Mrs. Ramlos was present at the first meeting, probably later on she was but——

Q. Can you recall the conversation you had with Mr. [277] Pierce at that time?

(Testimony of William E. Fox.)

A. Mr. Tucker, I wouldn't be able to do that. We were there seeking information regarding the track and I presume that was the gist of our conversation.

Q. Did you talk with him about stock of the track at that time? A. Yes.

Q. And to the best of your recollection, what was said about it at that time?

A. Well, as I remember now, I know I came away with the feeling that he would provide me with some stock.

Q. Can you recall what was said about it?

A. He told me, I think it was on this trip, he told me he thought he could get ahold of 3000 shares and I remember that he said they belonged to a lady whose husband had died and she was liquidating.

Q. Had you prior to that time said anything to him about your wanting to buy some stock, I mean before he said that to you?

A. Well, we told him, I think, anyway, we must have left the impression we were there because we were interested in the track.

Q. By being interested in the track, you mean you wanted to buy some stock in the track?

A. That's right. [278]

Q. Is that why you went to see Mr. Pierce?

A. That's right.

Q. Did you tell him that is what you wanted to talk about?

A. I don't know if we told him that. I know that was our motive in looking him up.

(Testimony of William E. Fox.)

Q. Then what was it he said about getting some stock?

A. I think he told me he thought he could get ahold of 3000 shares that belonged to a widow whose husband had passed away and she was liquidating.

Q. Was there any price discussed?

A. There must have been, Mr. Tucker, but I can't recall now.

Q. Did you see him again or talk to him again up to the time that this check is dated?

Hearing Examiner: What is the date of that check?

The Witness: The date is November 14, 1951. I think he called me on the phone probably a day or two before the check was dated. The bank was very slow getting the transaction back to Las Vegas and I think I had a telephone call from him.

Q. (By Mr. Tucker): Do you recall the substance of that telephone conversation?

A. Yes, he was in a hurry to get his money and wanted to know why it hadn't come through and so forth. [279]

Q. Between the time you talked to Mr. Pierce about getting some stock, did you have any information that he had gotten some stock for you?

A. Not until the bank called me.

Q. What bank was that?

A. Bank of America.

Q. Where?

A. It's in South Gate, Walnut Park Branch, but it's in South Gate.

(Testimony of William E. Fox.)

Q. Was that advice to the effect that there was some stock there for you?

A. Mr. Crowe was looking after it for me. I told him previously there would be some stock coming and when it did to call me or draw on my account for it. When it did come in, he called me.

Q. Did you have any arrangement with Mr. Pierce prior to that time about how the transaction was to be handled if he did get some stock for you?

A. Be sent to my bank.

Q. How many shares were sent to the bank—do you still have the certificate for that stock?

A. I think there's some there, Mr. Tucker.

Q. You have handed me a stock certificate bearing 10495. Will you refer to that and see if there's, if that is the certificate involved in that transaction? [280]

A. I think it is, I feel quite sure of it.

Q. Will you refer to the date on the certificate?

A. The date is November 6th and my check is dated November 14th so that must be the certificate.

Mr. Tucker: I don't want to introduce the certificate in evidence. I would like to read into evidence with consent of counsel the essential characteristics of the certificates so far as they are material here, this one being Certificate No. 10495 for 1100 shares of the common capital stock of Las Vegas Thoroughbred Racing Association, bearing date of November 6, 1951.

I wonder if it may be stipulated that the check referred to, so that we may leave these documents

(Testimony of William E. Fox.)

in the possession of Mr. Fox, is a check signed by William E. Fox, No. 2601, dated November 14, 1951, in the sum of \$3,000.00, payable to the Bank of America.

Mr. Sobieski: We will stipulate that you produced such a check but we don't stipulate it has any relevancy or any materiality with these proceedings or is connected up with the transactions.

Hearing Examiner: The testimony has been that Mr. Fox believes that is the check which he gave in payment of the shares which were sold a few days before and his reference has just been made. [281]

Q. (By Mr. Tucker): In your conversation with Mr. Pierce that you testified to, when he said that he would get some of the stock for you, was anything said with reference to the availability of stock of Las Vegas Thoroughbred Racing Association?

Mr. Sobieski: I object on the ground leading and suggestive, Your Honor.

Hearing Examiner: Have you exhausted this witness' memory of this meeting?

Mr. Tucker: I will withdraw the question.

Hearing Examiner: Really, I would like, if this witness has any recollection, for him to tell us a little more, if you can, as to how you happened to meet Mr. Pierce.

Now, you said you went to the Thunderbird and, to your recollection, you made inquiry. Who did you inquire of at the Thunderbird, do you recall?

Mr. Sobieski: Object to that as hearsay.

(Testimony of William E. Fox.)

Q. (By Mr. Tucker): Where did you go first on that trip? A. To the Thunderbird.

Q. Had you been to the office of the Las Vegas Racing Association?

A. Not on that trip. Mr. Ramlos had been on his trip before.

Q. The man who was with you?

A. That's right. [282]

Q. Was it Mr. Ramlos who had the information that led you to the Thunderbird?

A. That's right. Well, he had the information that some stock was available. I don't know whether I should say the stock was available or not.

Mr. Sobieski: I object to any conversation between this witness and Mr. Ramlos as hearsay, out of the presence of the respondent.

Q. (By Mr. Tucker): Did you get any direct information of your own knowledge from anyone that led you to the Thunderbird to see Mr. Pierce?

Mr. Sobieski: Object to that as hearsay.

Mr. Tucker: I am asking if he did have such information and propose to follow that up by what it was.

Mr. Sobieski: Immaterial.

Hearing Examiner: It is material if we can get it without having it in a hearsay fashion.

Mr. Sobieski: How else can you get it?

Mr. Tucker: I'm asking if he had such information and we will see whether it is hearsay or not.

The Witness: Mr. Ramlos had secured the information.

(Testimony of William E. Fox.)

Mr. Sobieski: I object to any conversation between this man and Ramlos as hearsay.

Mr. Tucker: You can't testify as to what Mr. Ramlos told [283] you.

Hearing Examiner: These are rules of evidence and you have to tell what you know yourself, not what somebody else told you.

Mr. Sobieski: This witness is under oath and is subject to all the provisions of a man testifying under oath and he is limited to testify to what he knows and we are entitled to have his testimony so limited.

Hearing Examiner. There is no showing Mr. Fox hasn't been very forthright and honest in what he has attempted to say. We want to indicate to you that there is no showing whatever you are not giving us the best information that you had at this time.

Mr. Sobieski: I don't mean to say that. What I mean to say is we are entitled to have the matter limited to what he knows.

Hearing Examiner: I know but there is no reason to be reminding this witness he is under oath. I'm sure he recognizes it. Now, getting over the legal technicalities, Mr. Tucker, you may proceed.

Q. (By Mr. Tucker): On this occasion, had you been given any information yourself, personally, by anybody connected with the Las Vegas Thoroughbred Racing Association indicating where you might meet Mr. Pierce? [284]

(Testimony of William E. Fox.)

Mr. Sobieski: I object to that on the ground of hearsay.

Mr. Tucker: I'm asking if he had such information.

Hearing Examiner: What is the answer to that?

The Witness: I had information that we'd find him at the Thunderbird Hotel.

Hearing Examiner: Find who at the Thunderbird Hotel?

The Witness: Pierce.

Hearing Examiner: Did you obtain that from anyone connected with the Thoroughbred Racing Association?

Mr. Sobieski: Object to that as immaterial.

The Witness: No.

Hearing Examiner: The answer is no.

Q. (By Mr. Tucker): Did you find Mr. Pierce at the Thunderbird Hotel and that is where the conversation you testified to took place? A. Yes.

Q. You have said that you talked with him about purchasing stock and you have said that he indicated that he thought he could get some from the named source?

Mr. Sobieski: Objected to as not an appropriate statement of the witness' testimony and being unnecessary to rehash it.

Mr. Tucker: I tried to abbreviate it.

Q. By Mr. Tucker): To go back to it, do you recall any other things that were said at that conversation about that transaction? [285]

A. That's been three years, Mr. Tucker.

(Testimony of William E. Fox.)

Hearing Examiner: You can make any inquiry further that you want to by way of the witness' recollection.

Q. (By Mr. Tucker): Do you recall any further, anything that was said about the availability of stock?

A. Yes, it was indicated by Mr. Pierce that there wasn't, it wasn't too easy to get.

Q. When you say, "it was indicated," did somebody tell you that? A. Mr. Pierce.

Q. Can you recall whether there was any discussion as to whether or not Mr. Pierce, himself, at that time had any stock?

Mr. Sobieski: Objected to on the ground leading and suggestive.

Hearing Examiner: That may be but——

Mr. Tucker: The witness apparently having exhausted his recollection, it's proper to ask a leading question to test the exhaustion of his recollection.

Mr. Sobieski: I don't think it is proper in the case in chief.

Hearing Examiner: Under the circumstances I think you may proceed in the light of the showing that the witness' recollection is somewhat dim.

The Witness: I went away with the impression that Mr. [286] Pierce owned some stock in the Las Vegas Racing Association.

Q. (By Mr. Tucker): Can you recall anything further said about either that or his going out to get some stock for you?

A. I can't recall, Mr. Tucker.

(Testimony of William E. Fox.)

Q. Do you recall how much you wanted to buy at that time?

A. Mrs. Fox and I decided that we would probably——

Mr. Sobieski: Object as calling for a conclusion of the witness, hearsay.

Q. (By Mr. Tucker): Is there something you told Mr. Pierce about it? A. Yes.

Q. All right, what did you say to him about it?

A. We had decided we would allocate twelve to fifteen thousand dollars for stock in the Las Vegas Racing Association.

Q. Can you recall whether between the time you had that conversation and the date of this check of November 14, 1951, you had any other talks with Mr. Pierce?

A. I think the only other one was over the phone when he called to find out why the money hadn't been coming through. The bank seemed to be, rather, they were always two or three days behind in getting stuff out.

Q. When would that have been in relation to the date this check bears, November 14, 1951?

A. The date that Mr. Crowe of the bank called me, I [287] immediately went to the bank and issued a check and it was a couple days later that I imagine I had this telephone call.

Q. Did you thereafter have any further talks with Mr. Pierce about acquiring additional stock of the Las Vegas Thoroughbred Racing Association?

A. Yes.

(Testimony of William E. Fox.)

Q. When was the next time you talked to him about it, to the best of your recollection?

A. Was it July?

Q. By referring to your checks, can you refresh your recollection?

A. Yes, I can. It was February, February of '52.

Q. I also hand you Exhibit 6 already introduced in evidence. Now, Exhibit 6 bears the date February 21? A. Right.

Q. Then, prior to that time did you talk with Mr. Pierce about more stock of the Racing Association?

A. I can't recall whether I did or not unless I did it—I know, it could have been a follow up to our first conversation when I met him in Las Vegas. It could have been that I talked to him separately about this. I can't remember now.

Q. Do you recall having had any conversation with Mr. Pierce about the price of stock or what you would pay for stock if he got it for you?

Mr. Sobieski: Object on the grounds leading and suggestive. [288]

Q. (By Mr. Tucker): When was that conversation?

Mr. Sobieski: May I have a ruling?

Hearing Examiner: The objection is overruled.

Q. (By Mr. Tucker): When was that?

A. That must have been in February because the stock was not very stable in the first transactions that took place but it finally settled to \$5.00 or \$6.00

(Testimony of William E. Fox.)

a share. That was the price that was prevalent at that time.

Q. Where did you get that information?

Mr. Sobieski: Objected to as calling for a conclusion of the witness.

Mr. Tucker: I am asking where he got the information. He certainly knows where he got it if he can remember.

Hearing Examiner: Objection overruled.

The Witness: That talk on the street in Las Vegas was \$6.00 a share.

Q. (By Mr. Tucker): You talked with Mr. Pierce about price? A. Yes, that's right.

Q. Did he say anything to you about it?

A. Yes.

Mr. Sobieski: Objected to as leading.

Hearing Examiner: Overruled. [289]

Mr. Sobieski: There is no foundation, no place nor time nor anything else. Certainly we have to have a foundation.

Q. (By Mr. Tucker): When did you talk to him about that?

A. I talked to him on the first trip I met him. It was in November.

Hearing Examiner: November of what year?

The Witness: 1951.

Q. (By Mr. Tucker): I notice the first purchase was of common stock? A. That's right.

Q. Did you ever talk with him about the price of units? A. Yes.

Q. When was that?

(Testimony of William E. Fox.)

A. That was in November.

Q. What did he say to you then?

Mr. Sobieski: May I ask who was present at this next conversation?

Mr. Tucker: I think he's already testified as to the November conversation.

The Witness: Mr. Ramlos and Mr. Pierce and myself.

Mr. Sobieski: Where was that conversation?

The Witness: Thunderbird Hotel.

Mr. Sobieski: When?

The Witness: It was in November, 1951. [290]

Q. (By Mr. Tucker): Did Mr. Pierce then say anything to you about the price of units?

A. Yes.

Mr. Sobieski: Objected to on the ground leading and suggestive.

Hearing Examiner: Overruled.

Q. (By Mr. Tucker): Did he say anything about the price of the common stock at this time?

A. No, he did not, as I recall.

Q. What was then said about the price of units?

A. \$6.00.

Q. With respect to Exhibit 6 and prior to the receipt by you of Exhibit 6, did you have any conversation with Mr. Pierce about further purchase of stock in the Association at or about that time?

A. Mr. Tucker, which is Exhibit 6?

Q. The yellow one dated February 21.

A. I see. Oh, yes, I talked to him.

(Testimony of William E. Fox.)

Q. When and where did you talk to him, to the best of your recollection?

A. I think, I know I talked to him on long distance over the phone.

Q. About when was that? [291]

A. It might have been along in June.

Q. I was referring to at or about February 21.

A. You mean regarding this?

Q. Regarding that.

A. Well, I must have talked to him a few days before February 21.

Q. Can you recall specifically?

A. I can't, Mr. Tucker. That's three years.

Q. Well, when you received this letter, Exhibit 6, did that come as a surprise to you?

A. No request had been made for that stock for Mr. and Mrs. Coffey.

Q. That refers to some stock for you, also?

A. That's right. No, that was no surprise because I had left the idea, I guess, I wanted to appropriate twelve, fifteen thousand dollars as an investment in the Racing Association.

Q. In stating that to Mr. Pierce did you indicate the price that you were willing to pay?

A. Well, there was only one price.

Mr. Sobieski: Objected to as leading and suggestive.

Hearing Examiner: Overruled.

The Witness: All I ever heard, I think I bought one little lot at, a small amount at \$5.50 but the going price was \$6.00. [292]

(Testimony of William E. Fox.)

Hearing Examiner: Where did you learn the going price from?

The Witness: From the people around the Thunderbird and people on the street and people there where we stayed.

Hearing Examiner: Did Mr. Pierce say anything about the price?

The Witness: He corroborated the price.

Q. (By Mr. Tucker): Did you inform Mr. Pierce anything about your willingness to pay that price?

A. Well, he went ahead and bought the stock. I must have said yes, I must have said it was all right because the stock was purchased for me.

Q. Can you recall that prior to February 21, 1952, that that price had been discussed with Mr. Pierce? A. Yes, it had been.

Q. Was this in connection with your indication of how much you were allocating to invest?

A. That's right.

Q. Was that price related to unit or preferred shares or common shares? A. Units.

Q. Exhibit 6, the letter of February 21, refers to certificate of stock having been delivered to the bank and did you go to the bank and pick up the certificate from the bank? [293]

A. I, certificates were left in the bank. I did go over and write them a check.

Q. Can you recall whether there were certificates for both preferred and common shares?

A. In the first lot, it seems to me as I remember

(Testimony of William E. Fox.)

now, in the first lot there were no preferred shares.

Q. That was in November?

A. That's right. In the second lot, there were units of common and preferred.

Q. What did you do with units of preferred stock?

A. They were sent in and transferred, that is, exchanged for the new stock which is issued.

Q. You refer to the reorganized company, you sent those in for stock of the Jockey Club?

A. That's right.

Q. So you don't have possession of those any more? A. No.

Q. Handing you a stock certificate bearing the number 10591, can you recall whether or not that is the certificate for the common shares that went to the Bank of America in connection with the letter of February 21, 1952, and in that connection, I direct attention to the fact that there's no date on the certificate?

A. That is what makes it difficult, Mr. Tucker. I can't recall when I received this. [294]

Q. You notice the letter of February 21, 1952, refers to 400 shares of common stock?

A. Is that—it's the only 400 shares I received, isn't that it? I think so.

Q. Do you have any other certificate for 400 shares? A. I don't think so.

Q. If I may direct your attention to the fact that Exhibit 5 heretofore introduced in evidence,

(Testimony of William E. Fox.)

on the page captioned "Prepared from Journal——"

Mr. Sobieski: Object. This is not a proper question to this witness.

Mr. Tucker: I think the objection may be well taken.

Q. (By Mr. Tucker): You have no other certificates for 400 shares?

A. I don't think so, I don't recall.

Mr. Tucker: Without putting the certificate in evidence, I submit to counsel for examination.

Mr. Sobieski: I stipulate the certificate need not be put in evidence and counsel has produced a certificate as he has described.

Mr. Tucker: A certificate bearing no date bearing number 10591 for 400 shares of common capital stock of Las Vegas Thoroughbred Racing Association.

The Witness: One of those which is on the bottom——

Mr. Sobieski: I object to that as a commentary statement. [295]

Mr. Tucker: That will come up. You go right ahead and tell me.

Hearing Examiner: I notice Commission's Exhibit 6, the letter from Mr. Pierce to Mr. Fox, February 21, 1952, which is in evidence makes a reference to the issuance of certain stock to the names of Allen Coffey and Marie Coffey. Is there any testimony as to who those people are?

Q. (By Mr. Tucker): Will you explain that?

(Testimony of William E. Fox.)

A. May I have that \$500.00 check there, Mr. Tucker? Mr. and Mrs. Coffey are bosom friends of Mrs. Fox and I and they wanted to invest a little in the Racing Association and she gave me \$500.00 to buy stock when I went up there.

Hearing Examiner: Where?

The Witness: To Las Vegas. There didn't seem to be any available at the time and I held her money for a month or two and then I gave her a check. I wasn't able to get it so I gave her my check back for the money she had given for the stock. They are friends of mine who live in South Gate.

Mr. Tucker: Now, the check that we have been talking about, that the witness has been referring to, I would like to reserve it for the witness, so if counsel will stipulate, we'd like to give the main features of the check into the record as follows: The check I now refer to is not the check about the Coffey transaction but the check that he referred to in [296] connection with the letter of February 21. That check is dated February 29, 1952, No. 2743, in the sum of \$3,000.00, signed by William E. Fox, and payable to the Bank of America. That is the check we have been talking about, is it not, from Mr. Fox.

Hearing Examiner: That represents the purchase of how many shares?

Mr. Tucker: That represents the purchase of what?

The Witness: Five hundred shares.

Q. (By Mr. Tucker): Shares or units?

A. Units.

(Testimony of William E. Fox.)

Q. Now, I notice this certificate for common shares that we have been talking about was for 400 shares and did they, what became of the other 100 shares of that 400 of the 500 units?

A. Well, as I recall, Mr. Tucker, this was 500 units here, I don't know, I don't recall that I bought any preferred stock separate from the units.

Oh, here it is, here it is, it was given to Mr. and Mrs. Coffey, see. He evidently had 500 units. He must have given me 500 preferred and 400 common and Mr. and Mrs. Coffey 100 common.

Q. That accounts for the entire purchase price of \$3,000.00 evidenced by the check to which we have referred? [297]

A. That's right. [298]

* * *

Q. After your purchase of shares in February, did you buy any more stock of the Las Vegas Thoroughbred Racing Association through Mr. Pierce?

A. In March.

Q. In what year? A. 1952.

Q. Do you have a check that evidences that transaction? A. That's right.

Q. What is the date of the check, to refresh your [305] recollection? A. March 28, 1952.

Q. Shortly before that time, did you have any talk with Mr. Pierce about getting additional units or stock? A. I can't recall.

Hearing Examiner: When, March of 1952?

The Witness: March of 1952.

Hearing Examiner: Tell us the circumstances

(Testimony of William E. Fox.)

surrounding that.

Mr. Tucker: For the purpose of refreshing the witness' recollection, did you go to Las Vegas in March of 1952?

The Witness: I hope this is right, we were there, the last trip on the birthday of Mrs. Ramlos. I'm inclined to believe that was in March.

Q. (By Mr. Tucker): Of 1952?

A. I think so.

Q. You do recall making the trip with Mrs. Ramlos? A. That's right.

Q. Did you talk with Mr. Pierce at that time about buying more stock? A. That's right.

Q. Can you recall as nearly as you can what that conversation was, telling us, first, where it was?

Hearing Examiner: Just your best recollection. [306]

The Witness: I think Mr. Ramlos and I got in the car and went down to Pierce's house to get the information as to whether there was any stock available.

Q. (By Mr. Tucker): Who was present when you went to his house?

A. As I recall, he and I and Mr. Ramlos.

Q. Do you recall the conversation at that time?

A. Wasn't very much. I was only there a minute.

Q. Can you recall what you said and what Mr. Pierce said?

A. We wanted to know whether or not some stock was available and he thought there would be.

Q. Then, did you talk with him any further

(Testimony of William E. Fox.)

about stock in this company between then and the date of this check on March 28, 1952?

A. As near as I can recollect, Mr. and Mrs. Ramlos and myself were invited to dinner that night by Mr. and Mrs. Pierce at the Thunderbird. I think that is the night we were entertained there. Of course, we did talk about the race track and the stock. I could be wrong on that but I think that was the time.

Q. When you and Mr. Ramlos talked to Mr. Pierce at Mr. Pierce's house at that time, can you recall whether there was any discussion at that time about price? A. The price was \$6.00.

Q. You have produced this check dated March 28, 1952. [307] Can you tell us the circumstances under which that check was issued, where it was issued?

A. That was issued in my store and the stock was delivered to me at my store. It did not go to the bank.

Hearing Examiner: Your store is in South Gate?

The Witness: South Gate.

Hearing Examiner: By whom?

The Witness: Mr. Pierce. I think this is, one of them was delivered to me and I think that is the batch.

Q. (By Mr. Tucker): You have produced here two certificates for common stock, Nos. 10611 and 10612. Are those the certificates that were delivered to you?

(Testimony of William E. Fox.)

A. That is part of it, yes, sir. I think, I'm positive in saying that that was delivered to me.

Q. These certificates were both common shares, did you also receive certificates for preferred shares? A. That's right.

Q. So that together with common shares they made units? A. That's right.

Q. And you received the same number of preferred shares as you did of the common shares?

A. As I remember, that's correct. The only common shares which came separate was the first lot which were sent to me from Las Vegas and the ones which came to Mr. and Mrs. Coffey. [308]

Mr. Tucker: With consent of counsel, I may read this into the record so that Mr. Fox may keep it.

The check referred to is No. 2606 on the Bank of America, March 28, 1952, payable to John Pierce's order in the sum of \$1,460.00, signed by William E. Fox, endorsed by John Pierce, for identification, a Fred A. Smith by endorsement guaranteed.

Q. By Mr. Tucker): Is the check evidencing that transaction?

A. That seems to be it, yes.

Q. Now, this evidences 400 shares of the common stock and ten shares of the common stock?

A. As I recall, I had some money in my pocket and I gave him some cash and the check was to make up the balance, \$1,460.00.

Q. So the additional price was paid by——

(Testimony of William E. Fox.)

A. Cash.

Q. Instead of check?

A. That's right. I think that it was on one occasion. I'm quite sure that was the occasion.

Q. Did you subsequently buy some other stock of the Las Vegas Thoroughbred Racing Association from or through Mr. Pierce?

A. What was the date of that one, March?

Q. This was in March.

A. Seems to me there was one other transaction.

Hearing Examiner: We have March, '52, now? [309]

The Witness: That's right.

Q. (By Mr. Tucker): You have produced here a stock certificate and a check, do those aid you in refreshing your recollection?

A. That was, I bought some in July. The check is dated July 15, amount of \$2,050.00. That seems to be the next transaction.

Q. In connection with the—this July, '52, can you recall how many shares were bought and the price of the shares at that time?

A. No, I couldn't, Mr. Tucker. No, I couldn't.

Q. By the way, where was that stock delivered?

A. Mr. Tucker, I can't recall. I think one of those batches was delivered to my store.

Q. In addition to the March transaction to which you have testified?

A. I'm not sure which one it was, whether it was March or this one but one of those batches was delivered to me at my store.

(Testimony of William E. Fox.)

Q. Can you recall whether you purchased any stock or received delivery of any stock subsequent to July of 1952?

A. Yes. Yes, dated October 11, 1952.

Q. Can you recall when you received that certificate or how you received that certificate?

A. No, I can't. I don't have a check covering that [310] amount of stock. I might be able to find it. I don't have a check that corresponds to that amount of stock.

Q. Did you receive preferred stock matching this certificate? A. I'm sure I did.

Q. And that you turned in, did you, on the exchange? A. That's right.

Mr. Tucker: The certificate that the witness has produced here to which reference has just been made, in lieu of being introduced in evidence, is described as Certificate No. 10696, transferred October 11, 1952, made out in the name of William E. Fox and Sexon Rosson Fox for 1540 shares of the common capital stock of Las Vegas Thoroughbred Racing Association.

Q. (By Mr. Tucker): Referring to this certificate bearing the October date to which you have testified, can you recall what the price was for the units? A. \$6.00. [311]

* * *

Q. Before recess, Mr. Fox, you testified that you have an obligation owed you by Mr. Pierce and that

(Testimony of William E. Fox.)

you have been handling that, together with another obligation owed to some other people?

A. Right.

Q. Did you identify the other people as Mr. and Mrs. Ramlos? A. Right.

Q. Can you tell us how much was due on the obligation to you as of October 25th last past?

Mr. Sobieski: Your Honor, I object on the ground there is no showing there was such an obligation.

Hearing Examiner: There should be a showing there was and the questions and answers have only been obtained for the record which are germane or material to the new issues, apparently, which the amendment to the order anticipates and [328] can only remain in the record if the amendment is authorized by the Commission.

The Witness: I think the record will show that I testified that was \$1375.00. I verified it as \$1325.00.

Mr. Sobieski: I move the answer be stricken, Your Honor. I thought I made an objection that there was no showing originally what the obligations were and I think the conclusion shouldn't follow unless there was an obligation and what it was.

Hearing Examiner: You can bring that out on cross-examination but, at the same time, I think the basis of the obligation has been shown now to establish that there is an obligation.

Q. (By Mr. Tucker): Does Mr. Pierce owe you any money? A. Yes.

Q. How long has he owed it to you?

(Testimony of William E. Fox.)

A. About two years.

Q. What was that money for?

A. Part of it was for \$325.00 for stock that I paid him for that he didn't deliver and part of it was a loan.

Q. Did you have any conversation with Mr. Pierce about the stock that he didn't deliver?

A. Yes.

Q. What was the conversation and who was present when you talked with him? [329]

A. I just think he and I at the time. He promised to send the stock and take care of them.

Q. When was that conversation as best you can recall?

A. I will have to look at those dates there. That was in March, 1952.

Q. Are you sure of that, Mr. Fox, will you look at your material there?

A. Either March or July, either March or July.

Q. What was the conversation you had with Mr. Pierce at that time whether it was March or whether it was July?

A. Well, the matter was brought up, I had given him more money than what the stock was worth when it was delivered.

Q. Did you call that to his attention?

A. Yes.

Q. What did he say?

A. He said he would send it to me.

Q. Send you what? A. Stock.

Q. Did you receive it? A. No.

(Testimony of William E. Fox.)

Q. Did you talk with him subsequently?

A. Yes.

Q. What did he say about it?

A. As soon as he could.

Q. When was that? [330]

A. Several times as brought out by the letters there.

Q. That relates to a matter of fact. What does that have to do with \$325.00 you mentioned a few minutes ago?

A. That \$325.00, that is what I overpaid him for stock, as I remember it.

Q. Did you talk to him about getting back the overpayment?

A. No, he was to send it to me in stock.

Hearing Examiner: Well, now, is the record clear on the overpayment? For what stock?

The Witness: On the stock which was purchased either July or March of 1952.

Hearing Examiner: Is that the Racing Association stock?

The Witness: Racing Association stock.

Mr. Sobieski: I would like to inquire what paragraph of the hearing order this subject is directed to.

Mr. Tucker: Right now I am trying to go back to the method of incurring this obligation. The witness said Pierce owed him some money and that was part of it. Now, I'm trying to find out how the money gets into this arrangement that he just now said had something to do with stock.

(Testimony of William E. Fox.)

Mr. Sobieski: Is this directed to Subparagraph E?

Mr. Tucker: It's directed to Subparagraph E in part and directed to the proposed new amendment in part.

Mr. Sobieski: Subparagraph E is the latest amendment. [331] Is it now contended that the \$375.00 that is referred to in Subparagraph E is a variance and what you mean is \$325.00?

Mr. Tucker: The witness had said that the figure \$375.00 was erroneous and \$325.00 is the amount, as I understand.

Mr. Sobieski: Then is it your contention that the, then, do you admit that the order for hearing in stating \$375.00 is erroneous?

Mr. Tucker: All I can go by is what the witness testifies to and if there is a variation from the version in the order, then, it will speak for itself.

Mr. Sobieski: That is what I wanted to find out about.

Q. (By Mr. Tucker): A moment ago you said that Mr. Pierce owed you an indebtedness of \$325.00, is that right? A. Right.

Q. And I asked you what it represented and you said it represented some money loaned and some money that you had coming back from overpayment on stock?

Mr. Sobieski: Objected to. I think the question is complex and compound and covers grounds already asked and answered.

Mr. Tucker: I'm bringing the matter to the at-

(Testimony of William E. Fox.)

tention of the witness in order to see if we can get an explanation of the transaction.

Mr. Sobieski: I suggest the witness and not counsel [332] testify.

Hearing Examiner: You can summarize it if you want to.

Q. (By Mr. Tucker): At the present time does Mr. Pierce owe you the stock or does he owe you the money? A. He owes me the money.

Q. Then, at what point did you reach any conclusion with Mr. Pierce about him owing you money instead of stock?

A. I think that was in April of this year. The letter there will definitely state, I think, it was April 31 or April 30.

Q. What was your discussion, what did you say and what did Mr. Pierce say at the time of that conversation? A. He agreed.

Mr. Sobieski: May I object on the ground there is no foundation laid as to the conversation and I think I shouldn't have to make such objections.

Q. (By Mr. Tucker): Who was there?

A. It was done by long distance and by letter, Mr. Tucker.

Q. Did you have a long distance telephone conversation about it? A. Yes.

Q. Who did you talk to?

A. Mr. Pierce and Mrs. Pierce, too. [333]

Q. When was that, as near as you can recall?

A. Well, it was probably April of this year.

(Testimony of William E. Fox.)

Q. Can you tell us what was said in that conversation?

A. Well, they agreed to send me the \$325.00 and \$100.00 a month on the balance.

Q. At that time did he owe you any other money in addition to the \$325.00?

Mr. Sobieski: Objected to as calling for a conclusion of the witness, leading and suggestive.

Hearing Examiner: I think he can answer whether he owes any additional money.

Q. (By Mr. Tucker): The question was addressed to the time of that conversation.

A. At that time it was \$1325.00 and \$325.00 was their arrangement and I accepted it for payment on the debt plus \$100.00 a month after that.

Q. On the balance? A. Right.

Q. And that made the balance then how much at that time? A. \$1000.00.

Q. So that as of April last past the net amount owed to you was \$1000.00? A. Right.

Q. How much has been paid on that since that date? [334] A. \$250.00.

Q. When was the last payment made?

A. August, I guess it was July.

Q. So that as of October 26 last past, how much did he owe you then?

A. \$1000.00 less \$250.00 which would be \$750.00.

Q. Were you handling this Ramlos account with Mr. Pierce in April? A. Yes.

Q. What was the amount of that?

(Testimony of William E. Fox.)

Hearing Examiner: What do you mean by "were you handling" it?

Q. (By Mr. Tucker): Well, what was the arrangement on that?

A. The arrangement was a check of \$100.00 would come.

Q. No, I mean—all right, I will go back.

Did you discuss with Mr. Pierce an obligation that he owed to Mr. and Mrs. M. C. Ramlos?

A. Yes.

Q. When did you discuss it with him first?

A. At the same time, in March that the matter was taken up regarding what he owed me.

Q. What was that conversation, was that on this telephone conversation?

A. That's right. [335]

Q. What did you say and what did he say about that?

A. I reminded him of the indebtedness and he said, yes, he realized it and, also, said he realized he owed Mr. and Mrs. Ramlos.

Q. How much?

A. I can give you a rough estimate on it, \$635.00.

Mr. Sobieski: I move the rough estimate be stricken since Mr. Ramlos is going to be the next witness. I don't see any reason for this man to guess in circumstances like that.

Hearing Examiner: When you say "a rough estimate," what is the basis, did you figure it yourself or did Mr. Pierce tell you, which?

(Testimony of William E. Fox.)

The Witness: They handled, she drew up a note and it's between \$600.00 and \$700.00.

Hearing Examiner: Who do you mean, "she"?

The Witness: Mrs. Ramlos.

Hearing Examiner: You didn't talk to Mr. Pierce about this, did you? Did you talk about the amount owed?

The Witness: I don't think so, about the total amount, no.

Mr. Sobieski: Will my motion to strike be granted, Your Honor?

Hearing Examiner: Yes, certainly, a rough estimate is a conclusion on Mr. Fox's part.

Q. (By Mr. Tucker): How far the estimate is off one way or the other——

Mr. Sobieski: I object to the question asking him to [336] estimate particularly since this witness is going to be on later on and we are wasting time and encumbering the record going into it in this round about way.

Hearing Examiner: Any conversation, Mr. Fox, which you and Mr. Pierce had, tell us about that.

The Witness: He told me he owed them between \$600.00 and \$700.00.

Hearing Examiner: Did he say that?

The Witness: Yes.

Mr. Sobieski: Object to that.

Hearing Examiner: I just never know what the answers are going to be. Any conclusions will go out but any statement of fact, as such, stays in.

Mr. Tucker: This is a statement by the defendant.

(Testimony of William E. Fox.)

Hearing Examiner: He just said that. It's in so far as the record is concerned. When Mr. Pierce makes a statement to Mr. Fox, that certainly can stay in the record.

Mr. Sobieski: I object to that as hearsay, improper——

Hearing Examiner: That objection has no basis, in fact, that I can see.

Mr. Fox, lawyers are entitled to object and it's their duty, as a matter of fact, to represent the clients, but, to laymen it very often is confusing so you just bear with us while we resolve the legal technicalities. [337]

Q. (By Mr. Tucker): In this conversation at that time in which this indebtedness from Mr. Pierce to the Ramlos was mentioned, what else was said about it?

A. He promised to send the money right away which he did.

Q. What money?

A. The \$100.00 per month.

Q. All right, now, what was said about the arrangement?

A. \$50.00 of that was to go to me and \$50.00 to her each month.

Q. Did Mr. Pierce then tell you that he would pay \$50.00 a month on the Ramlos account and \$50.00 a month on the Fox account to you?

A. That's right, until it was all cleared up.

Q. Now, you have testified that he made certain

(Testimony of William E. Fox.)

payments to you, five of them. Did he make any payments to you on the Ramlos' account?

A. Well, the amount came in one check, Mr. Tucker.

Q. Each month?

A. I cashed the check and gave Mrs. Ramlos \$50.00.

Q. How much a month of, what was the whole check for each month? A. \$100.00.

Q. So that you were sent monthly checks of how much each? A. \$50.00 each.

Q. Following that arrangement? [338]

A. That's right.

Q. How many checks of \$100.00 apiece did you receive under that arrangement? A. Five.

Q. Was it from those checks you got your \$250.00 you testified to? A. Right.

Q. And then the balance out of those checks being \$250.00 went to whom? A. Mrs. Ramlos.

Q. Have any payments been made to you on account of either your own obligation or the obligation of the Ramlos' owed by Mr. Pierce since the last payment you have testified to?

A. No. He called me up in September.

Hearing Examiner: Who is this, now?

The Witness: Mr. Pierce called me in September and told me he hadn't sent me any money and I told him, reminded him. He said this wouldn't happen again, he said he would send some right away and take care of the past month. Never got it. [339]

(Testimony of William E. Fox.)

Cross-Examination

By Mr. Sobieski:

Q. Mr. Fox, do you recall testifying earlier today that [361] in April of 1954 you made an arrangement with Mr. Pierce whereby he would pay \$325.00 then and \$100.00 a month on the balance?

A. Pay \$100.00 a month then until he had paid me.

Q. Do you recall having testified that?

A. I gave that with qualifications, sir, as best I could remember, do you recall? Those things, it's very difficult, sir. It turns out here that that \$325.00 was paid in August, and I had been hounding him for the rest of it—yes, August 22, and finally, on March 31, March 23, the effect was reached whereby he would send me \$100.00 a month, that is, \$50.00 for me and \$50.00 for Mrs. Ramlos. [362]

* * *

Redirect Examination

By Mr. Tucker:

Q. Is any money owing to you or to Ramlos secured by mortgage on Pierce's house or their automobile? A. No.

Hearing Examiner: Or anything else?

The Witness: The only thing, have two checks totaling a [395] thousand dollars and Mrs. Ramlos will tell you what she has.

(Testimony of William E. Fox.)

Hearing Examiner: When did you run those checks through the bank?

The Witness: A couple years ago.

Hearing Examiner: You deposited the checks to your account and what happened?

The Witness: Came back.

Hearing Examiner: From where?

The Witness: Las Vegas marked no funds.

Q. (By Mr. Tucker): Did you receive some assignment, an assignment of some kind of lease or patent application or something of that sort on land from Mr. Pierce? A. Yes, I did.

Q. You have that here?

A. Yes, but it is not collateral, can't be offered as collateral. It so states right on the lease.

Q. Will you get it out and tell us what you have reference to?

Hearing Examiner: In other words, I think we have reached the time, now, where we want to find out whether this is in full satisfaction of the debt.

The Witness: This is a government form, home-stead form.

Q. (By Mr. Tucker): And will you read from the part of it which says that [396] it can't be used for collateral?

Hearing Examiner: You are really asking him a sort of legal question now.

The Witness: It's printed right here.

Mr. Sobieski: We have here a man who is familiar with Nevada law. If there's a legal question, he can testify to that.

(Testimony of William E. Fox.)

Hearing Examiner: I think it's a legal question.

Mr. Sobieski: I object to the question on the grounds it calls for a legal conclusion of a witness who is not qualified.

Mr. Tucker: The document referred to by the witness which purports to be a Department of the Interior, Bureau of Land Management Form 4776, Lease Under Small Tract 5869, in which the Bureau of Land Management leases to Mr. John Pierce certain described lands to be used for homesite and it is dated December 11, 1950, purporting to be signed by the United States of America, title and so forth, and John Pierce as lessee.

Is that the document to which you refer?

Hearing Examiner: Did that come into your possession?

The Witness: He sent it to me.

Hearing Examiner: Did you ask him to send it to you?

The Witness: No, I did not. I asked him to give me something that would guarantee payment of the bill.

Hearing Examiner: When was it sent to you?

The Witness: A couple years ago.

Hearing Examiner: Now, you see, Mr. Tucker, I don't know, [397] I mean, if there is an outstanding obligation or not, I don't know.

Q. (By Mr. Tucker): Was that sent in payment of the obligation or security of the obligation?

(Testimony of William E. Fox.)

A. Offered as security for the obligation but this is not, cannot be offered as collateral.

Mr. Sobieski: Object to the last statement as a conclusion of the witness and voluntary and not responsive to the question.

Hearing Examiner: If he knows it can't be offered as collateral——

Mr. Tucker: The witness explained to me why he thinks so.

Hearing Examiner: Really, whether this is collateral or can be used as collateral or was accepted in lieu of the debt, I don't know, you see. You raised a question here.

Mr. Tucker: I asked a direct question whether it was given in payment or as collateral and the answer was given as security.

Hearing Examiner: You are asking the questions. Ask him the question if this was to satisfy the debt.

Q. (By Mr. Tucker): Was this given to you to satisfy and pay off that debt? A. No.

Q. What was it given for?

A. As collateral to guarantee payment of the debt. [398]

Hearing Examiner: In that respect, well, is this the thousand dollars which Mr. Fox speaks of here, the item of deficiency in the application for registration?

Mr. Tucker: Right.

Hearing Examiner: Have you got one or haven't you? Is it deficient or not?

(Testimony of William E. Fox.)

Mr. Tucker: I'm getting to that. I have been giving the testimony. Yes, it is. I have the file right here, File 83811.

Hearing Examiner: Actually, is there any thousand dollar deficiency, actually any item misrepresented?

Mr. Tucker: I intend to introduce this into the record. I haven't gotten to that point yet.

Hearing Examiner: What?

Mr. Tucker: A copy of File 83811, the application filed in this proceeding.

Hearing Examiner: You don't have to produce it in the record. It can be made part of the proceedings by reference but, again, if that provides, or if his answer given in the application for registration says he has no debts, now, in effect, is that a debt, I don't know.

Mr. Tucker: Mr. Fox testified Mr. Pierce owes——

Hearing Examiner: We have high regard for what Mr. Fox says but he is not a lawyer and he says the debt, is in effect, not satisfied, but whether it's been satisfied is a legal question. [399]

Mr. Tucker: It seems to me that is a matter of defense. He testified and stated there's a debt owing to him.

Hearing Examiner: Mr. Fox says that and accepted an assignment of a lease in payment of the debt; well, that is a different question.

Mr. Tucker: He testified he has not.

Hearing Examiner: Was there any letter ac-

(Testimony of William E. Fox.)

companying this lease to which we have been referring from Mr. Pierce to you?

The Witness: May I read this letter?

Hearing Examiner: Let me look at it. Is this letter in evidence?

Mr. Tucker: No.

Hearing Examiner: I don't think I have any business seeing it. As a matter of fact, until we get to the point of what's what, I'm not approving or disapproving this as the case may be. I'm just trying to clear up some uncertainties.

Q. (By Mr. Tucker): When did he send you this lease? A. A couple years ago.

Q. How long ago? A. A couple years ago.

Q. You referred to a certain letter. Was that letter written to you or was that letter written to your attorney? A. To my attorney.

Q. Was it written before or after that lease came into [400] your possession? A. Written after.

Q. How long after?

A. Mr. Tucker, that is a hard question. Quite some time.

Hearing Examiner: Did you accept the lease which was sent you in lieu of payment?

The Witness: No, I didn't.

Hearing Examiner: Did you write Mr. Pierce a letter or see him and tell him that you didn't?

The Witness: I have told him that it cannot be offered as collateral.

Hearing Examiner: Have you tried to collect that thousand ever since that?

(Testimony of William E. Fox.)

The Witness: Many times.

Hearing Examiner: The thousand dollars represented by the checks of \$700.00 and \$300.00, is that it?

The Witness: That's right.

Hearing Examiner: Did you redeposit those checks in the bank since then?

The Witness: No.

Mr. Tucker: May I refresh your recollection to the fact that he did testify that he has received payments totaling \$250.00 this year on the obligation?

Hearing Examiner: Is that true?

The Witness: That is true. [401]

Hearing Examiner: I had overlooked that.

The Witness: But those payments seemed to have stopped.

Q. (By Mr. Tucker): How much does he owe you now? A. \$750.00 plus interest.

Q. You have produced a letter dated November 10, 1953, addressed to one Charles S. Buck, Attorney at Law, purportedly signed by John Pierce?

A. Yes.

Mr. Tucker: I have just showed it to counsel and Mr. Pierce and they examined the letter sent by Mr. Pierce. Is that acknowledged?

Mr. Sobieski: Well, it's Mr. Pierce's signature but I don't think this witness has got any business testifying to it.

Mr. Tucker: I will ask this letter be marked Exhibit CX-29.

(Testimony of William E. Fox.)

(The document referred to was marked Commission's Exhibit No. CX-29 for identification.)

Q. (By Mr. Tucker): This letter purporting to be a letter dated November 10, 1953, bearing what counsel states is the signature of John Pierce, how did you come into possession of this letter?

A. My attorney turned it over to me.

Hearing Examiner: To whom is it addressed?

Mr. Tucker: It is addressed to his attorney by Mr. Pierce. The signature on the letter has been acknowledged and I [402] offer it in evidence.

Mr. Sobieski: I object; incompetent, irrelevant and immaterial.

Mr. Tucker: The question having come up about whether or not this lease is security is referred to in this letter specifically.

Hearing Examiner: I think it may be received. I'm not sure that is conclusive one way or the other. It may be received for what it's worth.

(The document heretofore marked for identification as Commission's Exhibit No. CX-29 was received in evidence.)

Mr. Tucker: It was brought up in view of the doubt you expressed about the matter.

No further questions.

Mr. Sobieski: Is that offered for any other purpose?

Mr. Tucker: While that is the immediate pur-

(Testimony of William E. Fox.)

pose, I don't wish to be confined to that purpose. I'm putting it in evidence.

Hearing Examiner: It's in evidence for any purpose.

Mr. Tucker: We will use it for any purpose for which I may want to use it.

Mr. Sobieski: After you received this lease a couple of years ago, you never returned it to Mr. Pierce, did you, Mr. Fox?

The Witness: No.

Mr. Sobieski: No further questions. [403]

* * *

FERN W. RAMLOS

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tucker:

Q. Your name is Fern C. Ramlos?

A. Fern W. Ramlos.

Q. And you are the wife of M. C. Ramlos?

A. Yes.

Q. Where do you live? A. Norwalk.

Q. N-o-r-w-a-l-k? A. Right.

Q. And you are married? A. Yes.

Q. And your husband is M. C. Ramlos?

A. Yes.

Q. Where is he at present?

A. Sacramento or Gridley.

(Testimony of Fern W. Ramlos.)

Q. In what business is your husband [444] engaged?

A. He is in the rental of construction equipment.

Q. What kind of construction equipment?

A. Tractors and bulldozers.

Q. How long has he been engaged in that business? A. About five years.

Q. And he was so engaged in 1951? A. Yes.

Q. And in 1952? A. Yes.

Q. Are you also engaged in business?

A. Yes.

Q. What kind of business are you engaged in?

A. I have a beauty salon.

Q. Where is that? A. In South Gate.

Q. Are you acquainted with Mr. John Pierce, the respondent here? A. I am.

Q. Have you and your husband had some security transaction with Mr. John Pierce? A. Yes.

Q. When did you first meet Mr. Pierce?

A. In November, I guess it would be, 1951.

Q. Where did you meet him?

A. In Las Vegas. [445]

Q. Just generally what was the occasion on which you met him?

A. My husband and I were down there on a week-end trip and he went over to the office of the race track and he met him over there.

Q. That was your husband? A. Yes.

Q. Did you go along on that trip? A. Yes.

Q. Did you go with your husband to the office?

A. No, I went back to the Thunderbird.

(Testimony of Fern W. Ramlos.)

Q. However, during that trip, did you meet Mr. Pierce? A. I just met him.

Q. When after that was the next time you saw Mr. Pierce? A. The following March.

Q. About what time in March was it?

A. Around the 20th of March because I remember we were there for my birthday.

Q. On what date is your birthday?

A. The 20th.

Q. Did you see Mr. Pierce on that trip?

A. Yes.

Q. Were you present at any time on that trip when the purchase of any securities was discussed with Mr. Pierce? [446] A. Yes.

Q. Can you recall when that was on that trip, at what stage of the trip?

A. Well, I think it was practically the whole three days of the time they were talking about stock. And my husband and Mr. Fox were asking about the stock and decided to buy some more. All the time we were there that was the topic of our conversation.

Q. How long were you there at that time?

A. Four days as I recall.

Q. Did you see Mr. Pierce just once or off and on? A. We saw him every day.

Q. Were you present at these conversations when your husband talked to Mr. Pierce about buying stock? A. Probably part of the time.

Q. Now as near as you can recall, will you tell us what was said by either you or your husband to

(Testimony of Fern W. Ramlos.)

Mr. Pierce in your presence, or by Mr. Pierce, to either of you about this stock?

A. Well, I would not now know exactly what was said. They were interested in buying stock and my husband wanted the combination stock. I think they called it "common unit stock."

But anything specific, I do not recall exactly what was said, other than talking about they thought it would be a good thing and that sort of thing. [447]

Q. Were you present when your husband told Mr. Pierce that he wanted to get some of these units? A. Yes.

Q. Was that on that trip? A. Yes.

Q. Now we have been referring to stock and to units. I don't think we have mentioned the name of the company. What was the name of the company?

A. I think it was Las Vegas Jockey Association or Las Vegas Race Track.

Q. Was it Las Vegas Thoroughbred Racing association? A. That is the one, that is right.

Q. Do you recall whether prior to that time your husband had telephoned Mr. Pierce about stock of the company?

A. Yes, he had, just a few days after we came back. The previous November before that they had telephoned and he and Mr. Fox——

Q. Were you present when they telephoned?

A. I was in the house.

Q. Did you hear the conversation?

A. No, not all of it. All I know was that they ordered, I think it was 1,100 shares.

(Testimony of Fern W. Ramlos.)

Hearing Examiner: Who do you mean when you say "they"?

The Witness: My husband and Mr. Fox. [448]

Q. (By Mr. Tucker): Do you recall whether between that time and the time in March when you went to Las Vegas, there was any other telephone conversation between your husband and Mr. Pierce of which you have any knowledge?

A. No, not to my knowledge.

Q. At the time that you have testified to, the conversation with Mr. Pierce, about an indication that your husband wanted to get some of this stock or at any time during that trip to Las Vegas, was anything said by Mr. Pierce about the availability of stock?

A. By that do you mean was it hard to get or would he be able to obtain stock for us?

Q. That is right. Can you recall what, if anything, was said about that?

Mr. Sobieski: May I inquire as to which visit you are asking about now?

Mr. Tucker: March.

Hearing Examiner: March of which year though?

Mr. Tucker: 1952.

The Witness: No, I do not remember anything about him saying he was unable to get it. Well, he said he could get us some, and I guess he went ahead and it was bought at the time.

Q. (By Mr. Tucker): On that trip, did you make a purchase of stock?

A. You are speaking of March now? [449]

(Testimony of Fern W. Ramlos.)

Q. You and Mr. Ramlos on the March trip.

A. Yes.

Q. And you have produced here a check dated March 22, 1952? A. Yes.

Q. Is that the check that was given?

A. Yes.

Q. At that time? A. Yes.

Q. For that purpose?

A. Yes, for 500 shares.

Hearing Examiner: How many shares did you purchase, Mrs. Ramlos?

The Witness: All of the shares you mean?

Q. (By Mr. Tucker): There was a subsequent purchase? A. There have been two purchases.

Hearing Examiner: Well, I mean does this represent the first purchase?

The Witness: Yes, of 500 shares.

Hearing Examiner: 500 shares?

The Witness: Yes.

Hearing Examiner: You gave a check in payment of that for how much?

The Witness: \$3,000.00. [450]

Hearing Examiner: This is March 22, 1952?

The Witness: Yes.

Q. (By Mr. Tucker): This is the check referred to? A. Yes.

Mr. Tucker: The check referred to has been marked Commission's Exhibit No. CX-32.

(Commission's Exhibit No. CX-32 was marked for identification.)

(Testimony of Fern W. Ramlos.)

Mr. Tucker: I ask that it be admitted subject to substituting a photostatic copy, so that the original can be returned to her.

Hearing Examiner: Do you want these old checks, Mrs. Ramlos?

The Witness: Well, he likes to keep them.

Hearing Examiner: She has already testified to it. I don't think it is necessary to have the check into evidence.

Mr. Tucker: The check is No. 223 dated March 22, 1952, on a branch of the Bank of America on Santa Ana Street. It is payable to the order of John Pierce in the sum of \$3,000.00 signed M. C. Ramlos and written above the signature of Mr. Pierce on the reverse side of the check is the following legend: "Payment in full for 500 units '500 com. 500 pref.' in Las Vegas Thoroughbred Racing Association."

(Commission's Exhibit No. CX-32 was received in evidence.) [451]

Q. (By Mr. Tucker): You also have produced here, Mrs. Ramlos, a certificate No. 10608 for 500 shares of the common capital stock of Las Vegas Thoroughbred Racing Association issued in the name of M. C. and/or Fern W. Ramlos, stating down at the lower left-hand corner, dated March 20, 1952, transferred March 25, 1952.

Is that the certificate for the common shares that you purchased at that time? A. That is right.

Q. And what became of the preferred shares in the units that accompanied those common shares?

(Testimony of Fern W. Ramlos.)

A. They were sent in when the other people took over the track. We sent these in to be changed and we got that new certificate you have.

Q. After the track was reorganized, you sent them in for the stock of the reorganized company?

A. Yes.

Q. Is that your understanding? A. Yes.

Q. When were these certificates, reflecting these 500 shares of common and 500 shares of preferred stock, delivered to you and Mr. Ramlos?

A. Well, within a week after they were purchased they were delivered to Mr. Fox. Mr. Ramlos and I were out of town [452] at the time and they were left with Mr. Fox.

Q. Where was Mr. Fox?

A. At his drug store.

Q. In South Gate, California? A. Yes.

Q. So that is how they came into your possession? A. Yes.

Q. And was that check for \$3,000.00 that has been referred to as Commission's Exhibit No. CX-32 delivered on or about the date it bears?

A. Yes, I think so.

Q. And where was that check turned over?

A. To Mr. Pierce in Las Vegas while we were there. [453]

* * *

Q. Is Mr. Pierce indebted to you and Mr. Ramlos at the present time? A. Yes.

Q. And was he indebted to you and Mr. Ramlos on October 26, last past, of this year? A. Yes.

(Testimony of Fern W. Ramlos.)

Q. And at that time how much did he owe [458] you?

A. You would mean October of last year?

Q. Just last month.

A. Oh, just last month.

Q. Yes.

A. Let us see. Well, it would be \$250.00 less \$627.00 if you can figure that out.

Q. You mean \$627.00 less \$250.00?

A. Yes, that is right.

Q. And how long had that been owing?

A. A little over a year.

Q. Are you familiar with the circumstances under which that obligation was incurred; how it came to be owing? A. Yes.

Q. Did you discuss it with Mr. Pierce; were you present when it was talked about with Mr. Pierce?

A. Yes, part of the time.

Q. When was the last payment you received on account of that indebtedness, as best as you can recall? A. Two months ago I think.

Q. And that is an indebtedness that is being handled for you by Mr. Fox, as far as collection is concerned?

A. Well, Mr. Pierce had sent it to Mr. Fox, but Mr. Fox isn't actually handling it for me. He sent it to Mr. Fox. In other words, he was sending \$100.00 and told Mr. Fox to give me \$50.00 and for him to keep \$50.00. [459]

Q. Now is that indebtedness secured by any

(Testimony of Fern W. Ramlos.)

mortgage on either Mr. Pierce's house or on his automobile? A. No.

Hearing Examiner: Is the record clear as to what this indebtedness consists of?

Q. (By Mr. Tucker): How was that obligation incurred? What does it represent, Mrs. Ramlos?

Mr. Sobieski: I think the question is immaterial. We have not objected to the fact that the indebtedness exists.

Hearing Examiner: Well, that is a conclusion and if the conclusion is adequate, I will not press the point.

Mr. Tucker: I have no objection of going into the question with the witness.

Hearing Examiner: Well, if it is a matter of any embarrassment, if it is conceded we will drop it.

The Witness: It is a personal matter.

Q. (By Mr. Tucker): After the indebtedness was incurred, did you talk to Mr. Pierce about it?

A. Yes.

Q. And was there any discussion of how it was to be paid?

A. Yes, he was going to pay \$100.00 a month, \$50.00 to me and \$50.00 to Mr. Fox, so it would be \$50.00 a month to [460] me.

Q. Were you present when that was discussed with Mr. Pierce?

A. Well, it was over the telephone. He told me that he would send at least that and as soon as possible would take care of all of it.

Q. And about when was that conversation?

(Testimony of Fern W. Ramlos.)

Mr. Sobieski: I object to that question on the ground that it is immaterial.

The Witness: I could not say exactly the date on it. We have talked about it a number of times.

Q. (By Mr. Tucker): Prior to that time, had you been making efforts to enforce collections from Mr. Pierce? A. Never to enforce.

Q. Well, to obtain?

Mr. Sobieski: Objected to on the ground that it is immaterial.

Q. (By Mr. Tucker): When was the obligation incurred initially?

Mr. Sobieski: I think the question is immaterial, irrelevant and incompetent.

Hearing Examiner: Well, is the record clear on one thing that there is an indebtedness?

The Witness: Yes. [461]

* * *

CHARLES L. MARGERUM, JR.

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tucker:

Q. Will you state your full name, please?

A. Charles L. Margerum, Jr.

Q. How do you spell "Margerum"?

A. M-a-r-g-e-r-u-m.

Q. And what is your occupation? [463]

(Testimony of Charles L. Margerum, Jr.)

A. I am a security investigator with the Los Angeles office of the United States Securities and Exchange Commission.

Q. How long have you been employed by the Securities and Exchange Commission?

A. Since December 1, 1947, about seven [464] years.

* * *

Cross-Examination

By Mr. Sobieski:

Q. Now, do you know whether the—as I understand it—are these bids collected from dealers that are considered reputable?

A. I would so agree, sir. I would say “yes.”

Q. Is the fact that one dealer was quoting one price and another dealer is quoting another price on that day, do you think that that indicates that either of these dealers [468] was acting improperly?

A. Not at all.

Q. How does it happen that one dealer was quoting one price and another dealer was quoting another price on the same day?

A. Well, I would say that the dealer that is quoting one price is willing to pay that much for the stock and the other dealer, who is quoting a slightly higher price, is willing to pay the higher price.

Q. Is there any standard by which we can judge whether it is a proper or an improper practice for one dealer being willing to pay one price and another dealer being prepared to pay another price?

(Testimony of Charles L. Margerum, Jr.)

Mr. Tucker: I object to the question. It is argumentative and it calls for a good deal of philosophy and speculation in its answer.

Hearing Examiner: Well, Mr. Margerum represents himself to be a specialist in this field and I see what Mr. Sobieski is driving at. And I think in this cross-examination that any line of inquiry which would have a tendency to challenge the accuracy of these quotations is permissible.

The National Daily Quotation sheets are not positive proof as such, that that is the market price on that day. It merely has a tendency to indicate the range.

Will you read the question, Miss Reporter? [469]

(Question read.)

The Witness: Do you want me to answer the question?

Q. (By Mr. Sobieski): Yes, please.

A. I do not know of any standard, Mr. Sobieski, that would make it proper or improper for one dealer to quote a certain price. I can say this, sir, if I may continue that briefly, that my interpretation of the National Daily Quotation sheets is that they are the measure through which the dealer works.

Q. As I understand it, the National Daily Quotation sheets for each day tell what the quotations were for the preceding day; is that your understanding?

A. These prices are the prices quoted for the day on which the sheet is dated.

(Testimony of Charles L. Margerum, Jr.)

Q. And is it your understanding that the sheet is delivered the same day it is dated, or is it delivered the following day?

A. The sheet is delivered the following day. As I understand it, the quotations are phoned in by the dealers to the office of the Quotation Service daily at 11:00 o'clock or some time that they have set prior to 11:00 o'clock or whatever time it may be. The sheets are then printed and delivered the following day.

Q. And as I understand it then, with respect to all the [470] securities, reputable dealers may quote different prices for the same day; is that correct?

A. Yes, I would say dealers put in their markets for that day.

Q. Now these figures which you have read do not indicate actual transactions, do they?

A. No, they do not, sir.

Q. Now, do these figures indicate quantities of stock, in other words, for how many shares such figures relate to?

A. No, sir, they do not.

Q. Now, calling your attention to the first one that you mentioned, July 24, 1953, I assume it is \$31½ and \$41½; is that correct?

A. That is the quotation on that day's sheet, yes, sir.

Q. Now, if a person went to a dealer and said on that day, "I have some shares to sell and what is the market?" Would the dealer quote him a price of \$31½ or \$41½?

(Testimony of Charles L. Margerum, Jr.)

A. I do not think he would quote him either price.

Q. Well, what do these figures indicate then?

A. These figures, in the industry's term, indicate the inside market. They are the prices between dealers.

Q. Then if a customer had stock to sell and went to this dealer, he probably would have been offered less than \$31½ per share? [471]

A. I would think so, based on these prices on that particular day that the dealer would mark it up or down, allowing for his profit on the transaction.

Q. And then if a customer went into a firm and said on this day of July 24, 1953, that he wanted to buy some shares of this stock, is it your expert opinion that the dealer would have charged a price in excess of \$41½ per share on July 24, 1953?

A. It is my opinion that he would charge a price of higher than \$41½.

Q. Is it your opinion that in charging the customer who wants to buy, a price in excess of \$41½ a share, that he would be trading at the actual market—the customer would be getting it at the price of the market that day?

A. I would say so if his markup is reasonable. If the markup and the price that he ultimately charged the customer bore a reasonable relationship to the sheet, I would say "yes."

Q. In other words, that would be a price in excess of \$41½ which would be, as you say, a reasonable

(Testimony of Charles L. Margerum, Jr.)

markup for the dealer? The customer in such case would be buying at the market price even though he was paying in excess of \$41½ a share on July 24th; is that correct? A. Yes, sir.

Q. Then taking the other side of the picture. The customer who was selling would be selling at the market even [472] although he was only receiving a price less than \$31½ on July 24th; is that correct?

A. That is correct. Incidentally, sir, on July 24th, according to this sheet, this is the only market that I know of.

Q. But you are referring now to the inside market? A. Correct.

Q. Between dealers and the price charged the customer differs from the inside market by the dealers' profit? A. That is right.

Q. Is that correct? A. Correct.

Q. And that if the one customer goes to the dealer and says he wants to buy and another customer comes in and says he wants to sell, and both tell the dealer that they want to transact their business in the market, the dealer will, nevertheless, and properly so, tell the people who are selling that the market is this and for the people who are buying, the market is this; is this correct?

A. That is correct, sir.

Q. And when he tells the seller that the market price is such and such for a selling customer, he will be quoting a different figure from the figure

(Testimony of Charles L. Margerum, Jr.)

which he gives to the customer who wants to buy at the market; is that your understanding?

A. Yes, sir, it is. [473]

Q. Now, with respect to the stock of the Terry Drilling Company, do you have any knowledge of how much markup the dealers were customarily making on the shares of that company?

A. No, I don't know with particular reference to that stock. I know what the custom of the industry is to take in the way of markup.

Q. Isn't there considerable difference between dealers as to what the markup is?

A. Not as to the maximum, I don't think.

Q. Does it also vary as to the number of shares that are available, the price?

A. Yes, sir. I think it would have some bearing on that.

Q. Now I notice that the inside price of the Terry Drilling Company stock, as quoted by you——

A. Not quoted by me.

Q. I mean, as read by you, I am sorry, I mis-spoke—had declined from a high of \$31½ on the bid side, from a low of \$21½; is it your understanding that prior to July 24th that the price of the Terry Drilling Company stock had been up higher than \$31½? A. I don't know.

Q. You checked only between those dates?

A. That is right, sir. [474]

Mr. Sobieski: No further questions.

(Testimony of Charles L. Margerum, Jr.)

Redirect Examination

By Mr. Tucker:

Q. With reference to dealers' markup, which is, I understand, a differential between the figure here and the figure at which a dealer may sell to a customer; is that correct? A. Yes.

Q. What is a maximum reasonable markup?

Mr. Sobieski: I object to that, as he has testified that it varies according to the circumstances.

Mr. Tucker: He said within maximum limits.

Hearing Examiner: He may answer.

The Witness: 5% would be my answer to that question.

Q. (By Hearing Officer): Who determines that?

A. Well, I think it has been determined by the industry itself and they more or less, follow their practice. We, in our inspections, if we find a firm taking a markup that exceeds 5%, we make further inquiry as to the reason for the markup being over 5%. That 5% is the N.A.S.D. guide, so to speak.

Q. The N.A.S.D. do not limit it to 5%, do they?

A. No.

Q. Is it a guide more than anything else?

A. I think in some circumstances that it may be more [475] or less than 5%.

Q. It may be more or even less?

A. Yes. I might say that if it is more, we usually make additional inquiry as to the broker and get

(Testimony of Charles L. Margerum, Jr.)

some indication from him as to why it is more than 5%.

Q. You do have some more than 5%?

A. We have some.

Mr. Tucker: Have you concluded?

Hearing Examiner: Yes.

Q. (By Mr. Tucker): Well, what about a 20% markup?

A. If I were making the inspection and saw a markup of 20%, I would look into it very thoroughly.

Q. Do you find very many 20% markups?

A. No.

Q. What about 100% markup?

A. I think that is still more unusual.

Q. Have you ever found a 50% markup in any of your inspections that you can recall?

A. Offhand I cannot say, Mr. Tucker, but there may have been cases. I am not absolutely certain of that.

Q. Has the N.A.S.D. gone on record in any way about the amount of permissible markup?

Mr. Sobieski: I object to that as it isn't the best evidence. [476]

Trial Examiner: He has referred to the matter of 5% as being a guide.

Mr. Tucker: National Association of Securities Division.

Q. (By Mr. Tucker): And in buying securities from customers, when a dealer bids and buys—we have discussed that—strike that.

(Testimony of Charles L. Margerum, Jr.)

Mr. Tucker: No further questions.

Recross-Examination

By Mr. Sobieski:

Q. As I understand it, Mr. Margerum, going back to the July 24, 1953, figure as an example, where it quotes \$3½ and \$4½, was that quotation given by the same dealer—I mean, was it the same dealer who made the bid who made the ask?

A. Yes, sir.

Q. And I suppose in his indicated range of transactions with other dealers, he would act as a principal, would he, in such transactions?

A. Yes, sir, I would assume that he would.

Q. And the range then between \$3½ and \$4½ is more than 5%; is that not correct?

A. It is correct.

Mr. Sobieski: No further questions.

Hearing Examiner: What is your understanding as to what a principal in an agency transaction consists of? [477]

The Witness: I would say a principal in a transaction is where a dealer sells something to a customer that he himself owns, or he has on his shelf, or he buys something from a customer and puts it on his shelf. Briefly, he buys wholesale and sells retail.

An agency transaction is where a dealer acts in the capacity of a broker for a customer and as that customer's agent, charges a commission for his services.

(Testimony of Charles L. Margerum, Jr.)

Q. (By Mr. Sobieski): Sometimes dealers have been known to buy something at one price and then they find the market comes down; isn't that correct?

Hearing Examiner: Yes. I was just about to come to that. Suppose he bought at \$2.00 and the market goes up to \$10.00. What could he sell it at?

The Witness: \$10.00 plus his markup.

Hearing Examiner: What would be his markup?

The Witness: 5%.

Hearing Examiner: Suppose he bought at \$10.00 and it went down to \$2.00. What could he sell it at?

The Witness: \$2.00 plus his markup.

Hearing Examiner: Which is the riskier transaction?

The Witness: The riskier transaction is the one that fluctuates between \$2.00 and \$10.00 and the risk is where the broker acts as agent or in a principal transaction, has [478] completed the sale inside of the order before he buys the stock. There is a little risk involved there.

Hearing Examiner: Let me ask you one more question, Mr. Margerum.

The Witness: Yes, sir.

Hearing Examiner: Suppose a principal had bought at the figure of \$10.00 and the market went down to \$2.00 and thereby he sustained a very severe loss, is there any way by which he can—is there any situation that you know of by which he can justify, in another transaction, the customer recouping?

The Witness: I don't quite follow you, sir.

Hearing Examiner: Neither do I.

(Testimony of Charles L. Margerum, Jr.)

Mr. Sobieski: Well, let me ask you another question.

Hearing Examiner: I started out with one thing and I got waylaid on the second thought, but go ahead, Mr. Sobieski, you may ask your question.

Q. (By Mr. Sobieski): Well, on this October 27th figure you mentioned that the sheets carried quotations from three dealers which were all at slightly different combinations of prices?

A. That is right, sir. Just to keep it clear, Mr. Sobieski, that is October 30th I think I quoted from, not the 27th.

Q. Well, the one that had the three figures was [479] October 30th and not the 27th.

A. October 30th has two quotations. I do not see October 27th, but I may have given it to you, sir. I don't seem to have an October 27th sheet here, but I may be wrong. October 28th sheet. There are three quotations on October 28th.

These quotations on October 28th—that is right—one dealer shows it bid $\$2\frac{3}{8}$ and offering it at $\$2\frac{3}{4}$. One is bidding $\$2\frac{1}{2}$ and offering it at $\$2\frac{7}{8}$. The third dealer is bidding $\$2\frac{1}{4}$ and offering it at $\$2\frac{3}{4}$.

Q. Then, as I understand it, there are two variables. One is the amount of markup and the other is the quotation on which the markup is based, and in the example you have given on the bid side, for instance, the three reputable dealers each quoted three different prices on the bid side?

A. Correct.

(Testimony of Charles L. Margerum, Jr.)

Mr. Tucker: Would you read that question again, please? I want to be sure that the witness understood it.

(Question read.)

Mr. Tucker: I want to be sure that the witness understands that the three dealers have each quoted three prices on the bid side.

The Witness: That is correct.

Mr. Sobieski: I mean that there were three dealers each [480] quoting one price and the one price which each one quoted was different from the one price which the other dealers had quoted.

You still understood it, didn't you, Mr. Margerum?

The Witness: Yes, that is right.

Mr. Sobieski: No further questions.

Mr. Tucker: No further questions of Mr. Margerum.

Hearing Examiner: All right, Mr. Margerum, you are excused. [481]

* * *

JOHN PIERCE

was recalled as a witness, and having been previously duly sworn, was examined and testified further as follows:

Hearing Examiner: You have been sworn previously, is that right?

The Witness: That is right.

Direct Examination

By Mr. Sobieski: [503]

Q. Mr. Pierce, you are the respondent in this case? A. I am.

Q. And you are a resident of Las Vegas, Nevada? A. I am.

Q. And how long have you been a resident of Las Vegas, Nevada?

A. Approximately six years.

Q. During the last six years, approximately, you have been a continuous resident of Las Vegas, Nevada, is that correct? A. Yes, sir.

Q. Now, with respect to the transaction with Mr. Hayward, Earl Hayward, did you have a transaction with him? A. Yes, I did.

Q. And, calling your attention to the month of February, 1952, will you tell us what that transaction was and how it arose?

A. Well, Mr. Hayward called me and asked me if I——

Q. Just a minute.

Mr. Tucker: Mr. Examiner, I think he should

(Testimony of John Pierce.)

state what the conversation was and state who said what and also fix the time.

Mr. Sobieski: Very well.

Q. (By Mr. Sobieski): Do you remember the date closer than the month of [504] February in 1952?

A. No, I don't.

Q. And he called you, did he call you by telephone?

A. That is right.

Hearing Examiner: Now, we are in February, is this 1951 or 1952?

The Witness: 1952.

Q. (By Mr. Sobieski): And can you tell us the conversation?

A. Well, he asked if I could buy or dispose of a thousand shares of his race track stock and——

Q. When you say shares——

A. Units. Units of race track stock.

Q. And what did you tell him?

A. Well, I said that I didn't know. You see, the stock was erratic—well, one week there would be a rumor that——

Q. Was this something that you said to him?

A. Yes. One week there would be a rumor that the stock was hard to get because somebody had said that they would finish the race track and then the next week there would be a rumor that nobody would ever finish the race track and every other day there seemed to be a difference of opinion of whether the stock was desirable or not. However, I told him that I would buy the stock from him at

(Testimony of John Pierce.)

the rate of \$3 a share, a unit, for 200 units, and \$4 a unit for the balance of the 800 units [505]

And I clearly indicated to him in the conversation that——

Mr. Tucker: Now, just what did you say? I object on the ground that the witness said he indicated something.

The Witness: I said, "Earl, this is net to you."

I said, "Is that all right with you?" And he said, "Yes."

Mr. Sobieski: Excuse me. Just a minute. May I see the exhibits?

Hearing Examiner: Off the record.

(Discussion off the record.)

Hearing Examiner: On the record.

Q. (By Mr. Sobieski): Calling your attention now to Commission's Exhibit No. 1, which is a photostat of a letter dated March 3, 1952, is that your signature at the bottom of your letter, Mr. Pierce? A. Yes, sir.

Q. And did you, on or about that date, transmit a check for \$600 as set forth in that letter?

A. Yes, I did.

Q. Now, then, calling your attention to Commission's Exhibit No. 2, this is a letter dated May 14, 1952, is that your signature at the bottom of the letter? A. Yes, it is.

Q. And also calling your attention to Commission's Exhibit No. 3, a check for \$800, dated May 14, 1952, payable to [506] Earl Hayward, is that a

(Testimony of John Pierce.)

photostatic copy of the check that accompanied that letter? A. Yes, it is.

Q. And I notice that this bears on it a number of bank stamps; could you tell us whether the check was paid or not?

A. This particular check wasn't paid and I therefore made a specific trip to Santa Barbara and paid him for the check in cash.

Q. \$800? A. \$800 which he testified to.

Q. Now, during this time, did you have any telephone conversations with Mr. Hayward in which this payment situation was discussed?

A. I did have some telephone conversations with him, but I imagine when I went to Santa Barbara——

Mr. Tucker: Just a minute. I object, your Honor, to what he imagines.

Hearing Examiner: Yes, I think we must confine it to what he knows.

Mr. Sobieski: Will you please just state your best recollection?

The Witness: My best recollection is that I went to Santa Barbara to give him the \$800 for this check; it was very nearly around that date and I discussed the balance of the money with him [507] there.

Mr. Tucker: Just a minute. The witness has said, "Around that date," and there has been no testimony as to any date.

Hearing Examiner: About the date of what?

The Witness: Of this check.

(Testimony of John Pierce.)

Hearing Examiner: What is the date of the check?

The Witness: May 14th.

Mr. Sobieski: I had previously stated what the date was.

Q. (By Mr. Sobieski): Now, at that time, did you have a discussion with Mr. Hayward?

A. Yes, I did.

Q. And who was present?

A. I believe that Mr. Hayward and myself were present.

Q. And what is your best recollection as to what was said by you and by Mr. Hayward in this discussion?

A. I explained to Earl that I wanted to borrow the balance of the money that he had coming to him and I asked him if it would be possible for me to do that and he said that it would be all right.

Hearing Examiner: How much was that balance, Mr. Pierce? Do you recall that?

The Witness: \$2,400.

Hearing Examiner: That was what was left after you paid him the \$800 in cash?

The Witness: \$800 and \$600. [508]

* * *

Q. (By Mr. Sobieski): Mr. Pierce, with reference to the financial statement which is attached to your application for registration, the item of indebtedness shows under the heading of "Miscella-

(Testimony of John Pierce.)

neous," the sum of \$500. Do you intend to file an amendment to your application?

A. Yes, I do, as soon as we get through with the hearing.

Q. And the correct figure should be approximately \$3,000, is that correct? A. Yes, sir.

Q. But you are going to make a very careful examination before the application is filed in order to correct that item; is that correct?

A. That is true.

Hearing Examiner: You mean before the amendment is filed?

Mr. Sobieski: Excuse me. Yes, that is true.

Q. (By Mr. Sobieski): And does the application state the value, I mean does the financial statement state the value of the lease that you mailed to Mr. Fox? A. No, it doesn't. [566]

Q. Do you have, or do you know what is the value of that property?

A. The adjacent property is now selling for \$2,000 an acre, which would place that lease at approximately \$10,000.

Q. And there are five acres? A. Yes, sir.

Q. And you consider this property, do you, do you consider this property as having an equal value with that of the other properties which are sold, the adjacent properties, for \$2,000 an acre in the vicinity?

A. That is generally what the real estate brokers reach in their evaluation of property, of the adjacent properties, that is what they sell at.

(Testimony of John Pierce.)

Q. And that is the basis upon which you have stated this value; is that correct? A. Yes.

Hearing Examiner: And this is what kind of lease, a lease of what?

The Witness: Five acres of land in Las Vegas that I homesteaded in 1950 and in the past four years it has reached that point now.

Hearing Examiner: Is it just plain land?

The Witness: Yes, sir.

Hearing Examiner: How far away is it, for instance, from the center of activities in Las [567] Vegas?

The Witness: Well——

Mr. Sobieski: I think I can clarify that by a question or two, your Honor.

Q. (By Mr. Sobieski): How far from the Strip is this land?

A. This land is approximately one mile from the Strip, but that does not mean that it is off of the center of activity because it is only about half a mile from a very popular road called Paradise Valley Road and 600 feet from another popular road which is called Flamingo Road.

Hearing Examiner: What I mean is, is there building activity progressing out in that direction?

The Witness: Yes. In fact, I am hemmed in between the race track and a very popular ranch called the Bar W Ranch which is owned by Brian Foy, the movie producer.

Hearing Examiner: And how long have you had this land?

(Testimony of John Pierce.)

The Witness: Since 1950.

Hearing Examiner: Since 1950?

The Witness: Yes, sir.

Hearing Examiner: And that is the one that you sent over to Mr. Fox, apparently as security or something of that kind?

The Witness: That is right.

Hearing Examiner: Have you ever borrowed any money on that lease?

The Witness: No. [568]

Hearing Examiner: In other words, it is unencumbered?

The Witness: Absolutely so.

Hearing Examiner: Off the record.

(Discussion off the record.)

Hearing Examiner: On the record.

Q. (By Mr. Sobieski): With reference to your statement to Miss Kendall, Mr. Pierce, about those fourplexes, have you been engaged in business activity in connection with construction in Nevada?

A. Yes, I have. I am associated with a licensed and bonded contractor in Las Vegas.

Q. And, during the past three or four years, have you engaged in business in connection with the construction industry?

A. I won't limit myself to the construction industry alone. I have done almost everything from raising money for mortgages to forming partnerships and doing construction improvements and interesting people in percentages in limited partner-

(Testimony of John Pierce.)

ships—just anything that will earn a commission or a profit.

Q. Now, Mr. Pierce, how important is it to you to receive favorable action on your application for registration with the Securities and Exchange Commission?

A. It is extremely important and it should be extremely obvious. The average individual can get an application approved [569] with just a three-cent stamp and I think that I have gone a thousand times further than that. I have, in the years that I have been in Las Vegas, I have established a fairly good reputation and made some good contacts and there is no question that I can use my registration honestly and logically to make a permanent business of it.

Q. And do you desire, at this time, to be registered and to comply with the applicable regulations of the Securities and Exchange Commission?

A. Yes, I do.

Q. And would a denial work a serious financial hardship on you in your opinion?

A. In my opinion, it would, since people are associating me now with some successful ventures in Las Vegas and they seem to wilfully come to me and contact me on proposed propositions that they intend to go into.

Q. And by that you are referring to new ventures? A. Yes.

Q. And by that you mean ventures that are now in the planning stage? A. That is right.

(Testimony of John Pierce.)

Hearing Examiner: Mr. Pierce, how old are you—that is not just curiosity because it has some meaning in terms of your application.

The Witness: 37 years old. [570]

Hearing Examiner: 37 years old. You do not look it. And you have been in Las Vegas for six years, have you?

The Witness: Yes, sir.

Hearing Examiner: Were you ever in the business of selling securities before you came out to Las Vegas?

The Witness: No, never; the first time I ever sold securities was for a registered broker, Mr. LaFortune, in Las Vegas for the race track.

Hearing Examiner: Now, and this question is not just curiosity by any means, but I will ask you this: Have you ever been involved in any proceedings before the Securities and Exchange Commission before?

The Witness: No, sir.

Mr. Sobieski: That is other than the proceedings that are in progress now.

The Witness: That is right.

Hearing Examiner: These are all encompassed apparently in this proceeding out here. Do you have anything further?

Mr. Sobieski: I have a couple of more questions.

Hearing Examiner: You may proceed.

Q. (By Mr. Sobieski): Now, with respect to your withdrawal of the previous application for registration, what was that?

(Testimony of John Pierce.)

Hearing Examiner: I would say that this is absolutely under the Jones case and I do not think that he has to explain [571] that.

Mr. Sobieski: Well, according to the evidence, I think that some of the evidence would show that some of the people that have been subpoenaed had requested him to withdraw it.

Hearing Examiner: You may go ahead, Mr. Sobieski, if you care to. I just wanted to point out that the Jones case gives him an absolute right to withdraw without any questions being asked with respect to the application for registration.

Mr. Sobieski: Well, that has been introduced in evidence and I would like to bring up that point, your Honor.

Hearing Examiner: You may go ahead, if you care to.

Q. (By Mr. Sobieski): With respect to your withdrawal of the application, what was the reason that you withdrew it at that time?

Hearing Examiner: This is the previous application?

Mr. Sobieski: The previous application which has been introduced in evidence and I do not know which exhibit it was but I think that there was only one.

Mr. Tucker: That would be Exhibit No. 30.

Hearing Examiner: All right.

The Witness: Well, regardless of how famous and fabulous Las Vegas is, I will say this: That it

(Testimony of John Pierce.)

is still a small town. I had and I still have a number of very valuable contacts in that town that took me years to build up and with indiscriminate subpoenas shooting all around the town, to hotel owners and large [572] club owners and bankers and accountants and anybody that may have ever said hello to me on the street, well, I was requested by some of the influential people to withdraw my application and I heartily agreed at that time.

Mr. Sobieski: In other words, you were requested by one or more of the people who had been subpoenaed as witnesses to withdraw it?

The Witness: That is right. I was reluctant but I had to, I should say.

Cross-Examination

By Mr. Tucker:

Q. In connection with the indiscriminate subpoenas that you have referred to, Mr. Pierce, were there any that came to your attention whose testimony or evidence hasn't been brought out in one way or another by stipulation or otherwise in this proceeding?

A. When I said indiscriminate, I meant, well, I had agreed to stipulate to the same things that we stipulated to at this hearing but, regardless of my agreement, the subpoenas went out anyway. As a matter of fact, the last subpoena was received the day that I withdrew my registration by telegram, which was the day before the hearing was scheduled.

(Testimony of John Pierce.)

Q. Mr. Pierce, isn't it a fact that the conference over a question of whether stipulations could be received or reached was scheduled between me and Mr. Sobieski for Monday, August 3, [573] the day before the hearing was to commence, which was August the 4th?

Hearing Examiner: I think that we are getting over into a field that hasn't any relation, so to speak, to the merits of the case.

Mr. Tucker: It is argumentative.

Q. (By Mr. Tucker): Now, do I understand you correctly, that one of the reasons why you want this registration is because people are coming to you with matters of a sort that would require a registration to handle?

A. Yes, some of the matters require registration and some don't and I don't hope to be held back by not having a registration.

Q. And these people that have come to you, were these matters, or would these matters, they have come wilfully to you?

Hearing Examiner: Wilfully—well, that is a term as used by Mr. Pierce. But I suppose, did you mean deliberately came to you because they have confidence in you or because you have acquired some skill and reputation in their belief?

The Witness: That is right.

Mr. Tucker: May I ask that this document which has been referred to previously by description, being the lease previously described in the record, may

(Testimony of John Pierce.)

I ask that that now be marked as Commission's Exhibit next in order? [574]

Hearing Examiner: Are you offering that document physically in evidence? That document may have value.

Mr. Tucker: I will ask leave to withdraw it for the purpose of making a photostatic copy of it.

Hearing Examiner: Well, don't mark that. If that has value, a copy should be used in lieu thereof.

Mr. Tucker: That is the manner in which I wish to offer it. The number will be Commission's Exhibit CX No. 35.

Hearing Examiner: All right. It will be identified as Commission's Exhibit No. 35.

(The document above referred to was marked for identification as Commission's Exhibit No. CX-35.)

Q. (By Mr. Tucker): Are you at all familiar with this document, Mr. Pierce—the lease that you told about as having been sent to Mr. Fox as security?

A. I am generally speaking, I am familiar with it. I haven't read it all, I haven't read all of the fine print, but it is a common document that we use all over the United States.

Q. Now, it provides in here that the lessee agrees to construct upon the land to the satisfaction of the regional administrator of the Bureau of Land Management improvements appropriate for the use for which the lease is issued and that plans may be sub-

(Testimony of John Pierce.)

mitted to the Regional Administrator for approval in advance of construction. It also says that the land is leased [575] to be used for homesite purposes only. What improvements have you put on these lands?

A. I have put no improvements on it and I am very happy that I haven't, because they just passed a new ruling in the Bureau of the Interior that all that is required to prove up the land and claim ownership is to drill a well and that would only run about \$250.

Hearing Examiner: A well for what?

The Witness: For water. They call it the third option.

Mr. Tucker: I will object to the answer as being hearsay.

Hearing Examiner: No, he speaks apparently whereof he knows, whether or not he knows or not, he speaks as if he knows.

Mr. Dotson: If the Court please, I could make a statement.

Hearing Examiner: If Mr. Dotson wishes, he could do so.

Mr. Dotson: In Clark County, there has been an organization formed called the Home Sitters League, or something of that nature, and there are some thousand of these same people who have acquired the small tract parcels under the same type of lease with an option to either purchase—I believe that is the terminology in this lease—that upon certain improvements being made they will acquire this option.

(Testimony of John Pierce.)

However, through the efforts of this Home Sites organization, they have required [576] additional sanctions and, as I understand it, there are three choices:

One is that improvements may be made and the land acquired in that manner with a small additional payment per acre.

The second is that they can drill a well, and I believe that there is a small additional payment, just what it is, I couldn't state and I would rather be accurate or not state it at all.

And the other one is that the land may be purchased outright on an agreed statement of value from the Bureau of Land Management, coming out of the San Francisco regional office there.

This is something that has only happened in the last, well, I believe it has been just since July and it has been done through the efforts of this particular group, together with the efforts of the congressmen and senators of our state and also through the Bureau of the Department of the Interior.

The Witness: And I might add that there are a number of similar cases where the homesteaded land later became very valuable property right on the strip.

Hearing Examiner: Now, you indicated, as I recall, something like \$2,000 per acre which was the going price for similar land; is that correct?

The Witness: Yes. The adjacent lands are selling for \$2,000 an acre and that is land that is right abutting mine. [577]

(Testimony of John Pierce.)

Hearing Examiner: Do you know, of your own knowledge, what it is being sold for?

The Witness: Yes, \$2,000 an acre.

Hearing Examiner: I mean, for what purpose?

The Witness: Oh, for private dwellings mostly, and that sort of thing.

Hearing Examiner: Well, I don't know anything about that country, but I vision it as being out where the sand fleas are; now, I may be wrong.

The Witness: Well, that is, or that was Las Vegas several years ago, all right.

Hearing Examiner: Oh, I see. As I say, I visioned it as sand flea country. And I will say that that is all the more reason why I should get out to see just exactly what exists around Las Vegas.

Mr. Dotson: It might be pointed out to the Court that of my own knowledge, some of that same five-acre tract was sold on what we call Highway 91 and just beyond the Strip for \$300 a front foot. And, of course, that is only a mile or two from where John's property is.

Hearing Examiner: You have no roads near your place?

The Witness: Yes, I am just 600 feet off of the road.

Hearing Examiner: What kind of road?

The Witness: A paved road, a cross-county road that goes from Highway 91 to Boulder Highway which is another main artery. [578]

Hearing Examiner: This road that is going

(Testimony of John Pierce.)

through your property doesn't lead to Death Valley, does it?

The Witness: No, sir.

Mr. Dotson: It is in an area where they have been selling improved property within a half of a mile of John's property; it is in an area where half an acre to three-quarters of an acre is going anywhere from \$1,800 to \$2,500 an acre, depending on the location to a particular corner and that sort of thing.

Hearing Examiner: And that is for building purposes?

Mr. Dotson: Well, actually, very little building, but the speculation of land is terrific and there are some houses and homes that are being built.

Hearing Examiner: Well, assuming and without conceding anything, Mr. Staff Counsel, that the property is worth \$10,000, how much would that leave, how much would you claim that that would leave the financial statement deficient?

Mr. Tucker: Well, it would still be the error in the statement of the liabilities, an error on the liabilities side. It is not a question of ratio; it is the question of whether or not the liabilities were properly stated.

Hearing Examiner: Well, you mean as they exist now?

Mr. Tucker: As they existed at the time that the statement was made.

Hearing Examiner: That is right, but I say that if per chance Mr. Pierce had this property that is worth somewhere in [579] the neighborhood of what

(Testimony of John Pierce.)

he says is the going price of other property nearby is demanding and if this had been included in the financial statement and if it is included in the amendment to the application, would that render the defect negligible?

Mr. Tucker: It seems to me that we have another defect and that is concealment of assets, failure to include an asset that is worth \$10,000.

Hearing Examiner: Well, it seems to be working in the reverse, so to speak. Now, I don't know. I am just trying to get your views.

Mr. Pierce, why didn't you include this lease as an asset?

The Witness: It was not intentional. It was inadvertent. The same thing goes for those personal obligations that I had, none of them were intentional.

Hearing Examiner: No, but—well, what I mean—you file your statement and you assumed the responsibility. Now, you had this lease which has presumably been assigned to Mr. Fox.

The Witness: It hasn't been assigned. He is holding it as security.

Hearing Examiner: How much do you owe him?

The Witness: \$750.

Hearing Examiner: Well, you go ahead, Mr. Tucker.

The Witness: It is obvious that I had rather have the [580] lease and I certainly will have it.

Hearing Examiner: Well, you see, you simply file, your filings with the commission are tested on

(Testimony of John Pierce.)

the basis of what you say and that is all the Commission apparently knows anything about.

But would you say, Mr. Staff Counsel, would you contend that there was a serious dereliction of duty if he had a lease of \$10,000 and didn't set it forth in his financial statement?

Mr. Tucker: It is my understanding of the regulations which requires the filing of a financial statement that it requires the filing of a reasonably accurate statement and, if an asset worth \$10,000 is omitted from it, it is a serious dereliction and if the liabilities that are unstated amount to \$2,500, that is a serious dereliction in the supplying of the information in the statement that is required to be filed with the Commission.

Hearing Examiner: Well, I wouldn't know, but I will study those applicable rules.

Mr. Tucker: It is our position that an accurate statement is required.

Hearing Examiner: I thought that the Commission was primarily concerned with setting forth all of the amounts that the respondent owed primarily. If his financial statement disclosed accurately the amount that he owed together with a reasonable statement of his worth, how could one be prejudiced by [581] not showing that his worth was greater, for instance?

Mr. Tucker: The availability of assets is one feature of a man's credit in doing business and one purpose of the financial statement is to disclose all

(Testimony of John Pierce.)

of these assets in case that it is necessary to have recourse to them for any purpose.

Hearing Examiner: Of course, at the time that this statement was made apparently this lease was then deposited with someone else as security or collateral. I think that it has been said that it was put up as collateral. Of course, I don't know what it is or what the legal contemplation was but apparently he didn't conceive of it as an asset at the time since it was hypotheticated, so to speak, with Mr. Fox.

I don't know. I am just trying to raise some points here.

Mr. Tucker: Well, there are other inferences that could be drawn from his failure to list it.

Hearing Examiner: Well, if I am willing to deal with someone who shows a net credit, net assets of a thousand dollars, am I prejudiced if that fellow turns out to have \$20,000?

Mr. Tucker: Perhaps not in that particular situation. But in the event that you must have recourse to enforce an obligation, that would present another situation.

Hearing Examiner: That is a second point, Mr. Tucker. That is going further and that is not answering my question. My question simply is if I am willing to deal with someone who [582] shows a thousand dollars net assets, it would seem that I would be more than willing to deal with him if he showed \$20,000.

Mr. Tucker: Well, there is another situation,

(Testimony of John Pierce.)

too, as far as this lease is concerned, and that is that at this point it is nothing but a lease. It was not assigned to Mr. Fox.

Hearing Examiner: Well, possession is nine-tenths of the law, as is sometimes said, you know. Mr. Fox had it in his possession and Mr. Fox, if he had wanted to become determined about it, he could have held fast to it as long as he wanted to until some court proceedings may have been instituted to recover it and I am not sure that he could have even recovered it without Mr. Fox making some other arrangements.

Now, the only thing is the Securities and Exchange Commission, as is not true of every Federal agency, or apparently so, they are always leaning over backward to be absolutely fair, as I know that you want to be.

We have no business taking advantage of anybody here when the Securities and Exchange Commission is known for its fairness as well as its firmness. This is a situation that must be appraised on its face. Here we have testimony of its value and nothing indicating otherwise. It may not be worth 50 cents, this lease, but the record discloses that it is worth something.

Mr. Tucker: Well, we have some statements—I won't concede that we have much testimony about the value of this [583] lease—but we have some statements about the value of some lands around it.

Hearing Examiner: Well, he said that the lands adjacent to it were worth a certain amount and we

(Testimony of John Pierce.)

also have an interesting statement from counsel, Mr. Dotson, who impresses me as knowing something about the situation in that part of the country, and we always listen to the statements of counsel very carefully, the statements of lawyers, whether they are testifying or not because, as you know, they are officers of the Court to which they are accredited.

I am just raising some of these points. You may go ahead, Mr. Tucker.

Q. (By Mr. Tucker): Mr. Pierce, it is a fact, is it not, that no assignment of this lease, Commission's Exhibit No. 35, to Mr. Fox has been executed?

Mr. Sobieski: I will object to the question as calling for a conclusion of the witness. I think that the document in evidence shows what the transaction was.

Hearing Examiner: Well, actually, whether the document is assigned or not, in the eyes of the law, if it is handed over to the person to be benefited, he thereafter or immediately acquires a right of a very definite kind, a very definite kind of right.

Mr. Tucker: Well, he has possessed the right, perhaps an [584] equitable right to an assignment.

Hearing Examiner: That is correct. The transferee has something of value.

Mr. Sobieski: Is that your ruling on my objection?

Hearing Examiner: Off the record.

(Testimony of John Pierce.)

(Discussion off the record.)

Hearing Examiner: On the record.

Will you read the question?

(The question was read by the Reporter.)

Hearing Examiner: I think that the respondent can answer that question. He has shown knowledge and wisdom. He has shown that he has an understanding of the meaning of such legal terms and I think that he could answer that all right.

The Witness: To date, there has been no legal assignment of this lease to Mr. Fox.

Hearing Examiner: What provision was made on the document for assignment of assets?

The Witness: I would like Mr. Dotson to answer as to the procedures that they use in Las Vegas and have been continuously using, transferring and assigning these leases.

Mr. Dotson: I wonder if we could go off the record. This is a rather exclusive type of arrangement and I would prefer my comments to be off of the record.

Hearing Examiner: Well, we can go off the record first.

(Discussion off the record.) [585]

Hearing Examiner: On the record.

Mr. Tucker: You have referred to the fact that there is some evidence as to a value in this lease that has been referred to as Exhibit No. 35 and I

might comment that the only evidence of that that we consider in any way competent would be under the theory that an owner can always testify as to what he believes to be the value of his own land.

Hearing Examiner: In this case, the owner has more knowledge than you or I have and we also have a statement from Mr. Dotson, Mr. Tucker, and while it is not evidence, I would use that if it became necessary.

Mr. Tucker: Well, Mr. Dotson does not represent the respondent.

Hearing Examiner: I am sorry, but Mr. Dotson is assisting counsel and he is from that area and, further, he has impressed me with his knowledge of the situation in general insofar as the area is concerned and the tracts of land, insofar as they are concerned.

Mr. Tucker: On this particular feature of the case, staff counsel has no information and it may be necessary that we may have to request an extension of time to make our own check.

Mr. Dotson: Wouldn't that be obviated by the filing of an amendment to the financial statement?

Hearing Examiner: Of course, all that I have before me at [586] this time is the financial statement.

Mr. Dotson: Assuming that that would be done prior to the time that the extension was requested.

Hearing Examiner: It still would not be in the record of this proceeding.

Mr. Tucker: I do not think that the filing of an amended financial statement would correct the de-

fect after the Commission by its raising of the issues has directed attention to the deficiencies. I do not think it corrects it.

Hearing Examiner: No, but the question right now is this: Is there a deficiency if the lease has value? The deficiency, you contend, exists by virtue of the balanced statements in the financial statement and I can understand that those statements would need reshuffling and rearranging and, to that extent, if there is any deficiency situation, it would be in that way.

Now, Mr. Tucker, of course, my statements are not to be regarded as prejudging in any respect here. But I am interested in this possible \$10,000 more or less value attached to the lease.

Mr. Tucker: As far as the financial statement itself is concerned and the statements of liabilities, we have collateral facts of record about statements made to Mr. Burr of the Securities and Exchange Commission about certain liabilities having been extinguished when in fact they were not extinguished [587] and not reflected in the financial statement that was submitted at the same time.

So, it goes beyond—I think it goes beyond a mere question of net worth which is the matter, I believe, that you are specifically focusing on.

Hearing Examiner: I must admit that I have been concentrating primarily on net worth. I will listen to any arguments on either side at the proper time on that question.

Mr. Sobieski: Well, I would like to observe, your Honor, that under the item “miscellaneous”

on the balance sheet, that that should have been \$3,000 instead of \$500 in liabilities and the matter of this lease, it should have been included as the assets.

However, because a man leaves a miscellaneous amount out, he might very well still be in a solvent financial condition. I think that they are straining at a net to draw a sinister motive from that.

I think that the financial statement here, well, I think the matter of how much the obligations are and how much his net worth is, if there is error, I think that those are just inadvertent. After all, he left both of them out. And, therefore, I think that it is trying to make too much out of it, a mountain out of a molehill and I also think that the matter should be and it will be corrected.

As your Honor knows, we have been very busy during the [588] last few days and that is the reason that it has not been corrected previously.

Hearing Examiner: We have been very busy actually for the last ten days. All right, at the proper time, Mr. Sobieski, you will, of course, brief and urge that point.

Mr. Tucker: I don't know whether the record shows that we have offered this Exhibit No. 35 subject to withdrawal. I know that we discussed it. In any event, I now offer Exhibit No. 35.

Hearing Examiner: And what is Exhibit 35?

Mr. Tucker: Being the lease referred to, the lease about which we have been talking in the last five or ten minutes.

Mr. Sobieski: I have no objection. May I make the suggestion, however, that the Reporter not place any marks on this lease and let the Reporter's notation be placed on a separate sheet of paper which can be clipped to this lease and to the photostat when it is prepared. [589]

* * *

Mr. Dotson: Very well. In my practice, I represent two or three construction organizations from time to time, one constantly, and also have many friends engaged in the real estate business.

One, in particular, who deals in property in the Paradise Valley area, which is the section commonly referred to as Las Vegas, extending south from Las Vegas, from about the race track on out to maybe ten or fifteen miles to the southern part of Las Vegas.

I run into him on many occasions and we have discussed this and he has indicated to me the price at which he sells the property upon the transfer of fee title and in making any statement concerning the value of this land, it would have to be considered with these facts in mind, what is necessary to bring this property of Mr. Pierce into a fee title and the cost of this particular function and deduct that from the value of the land, and then you have the approximate value of Mr. Pierce's interest or that interest which may ripen.

Of my own personal knowledge, in an area in the next section south of Mr. Pierce's property, I was discussing the purchase of an acre of land for \$2,-

500.00. The acre abutted the gravel street and had no other improvements, no power line, no water. That is from my own personal experience.

That is in section 36 of the same range of township. [635]

In my practice, I have an assistant named Dale Cook who handles a great deal of real estate transactions and also represents the Title Company, and naturally over a period of some years, some two years, I have been associated with him in these matters from time to time.

And this is hearsay. But in a section which would be approximately four sections further out from Las Vegas and three section over to the west, there was a transaction involving a five acre tract. This particular tract abutted Highway 91.

It involved a frontage on the highway which sold for \$3,000.00 of front feet, so that the fact which, I think, can pretty well be generally stated with some exceptions, is that these small tract leases, while not transferable as simply as a grant bargain and sale Deed, can be transferred still, and they are dealt in, in Las Vegas. That is the five acre and two and a half acre tracts.

There are several types. There is also the Pittman Act which allows you to pick up 160 acres in some areas, but of course, none of that is right adjacent to Las Vegas. Some of it is out forty or fifty miles.

Now, that particular tract based upon the front footage price, which is on Highway 91, some five sections south of the Flamingo, which would be five miles. That is out of Las Vegas some distance;

five miles from the Flamingo and the [636] Flamingo is some four miles from the center of the town.

Hearing Examiner: What is the "Flamingo"?

Mr. Dotson: The "Flamingo Hotel" which is the first large hotel as you go into Las Vegas. That probably sold for a price of something like \$15,000.00 subject, of course, to the transfer of the interest according to the procedure which I stated the other day.

The agreement to withdraw is sent into the Bureau of Land Management with a subsequent application of the party who might otherwise be called "the purchaser," the relinquishment stating that they wish to withdraw in favor of the purchaser.

Hearing Examiner: Of course, Mr. Pierce's land is not on the highway?

Mr. Dotson: No, it isn't but it is in an area where you could buy it at \$1,500.00 an acre and hope to make a profit.

Hearing Examiner: You are familiar with Mr. Pierce's land?

Mr. Dotson: Yes, I know where it is. In observing the map which Mr. Tucker has put in evidence, I might state that there is now a gravel avenue coming out of Las Vegas called "Eastern Avenue" which is a county road. Then three sections down, there is Bond Road. That is maintained in conversation around Las Vegas to be a main thoroughfare in the development of this Paradise Valley area. [637]

Hearing Examiner: Where does Paradise Valley lead to, Mr. Dotson?

Mr. Dotson: The east avenue comes in at the intersection of Fremont and Charleston Boulevard, which are the two main streets in Las Vegas. It comes south directly into Paradise Valley.

This, according to the map, is the road going to Boulder City and this is Henderson out in that area. This is Highway 91 which comes south from Los Angeles. This area in here is what they call "Paradise Valley." I don't know the exact limitations as far as the boundaries go.

Hearing Examiner: That is between Boulder Highway and the Los Angeles principal highway and about how far from the city?

Mr. Dotson: The boundary of the race track would be about two and a half miles from Fremont and Main Street, according to this map, so this is the edge of the race track property.

In this area south of the race track there is quite a large development. There are several private homes, the value of which would exceed \$15,000.00. It isn't a small home but it isn't a large home.

Then Mr. Pierce's property is two sections over from the race track and about two down.

Hearing Examiner: That is two miles over and two miles [638] down in a southerly direction?

Mr. Dotson: Yes. The other property I spoke of the other day, is less than a mile from Mr. Pierce's property. It just shows the development of the property. I think whether the ranch is there or not the property would have the same price.

I intended to buy some property out there myself but I have not been able to find anything I want.

Hearing Examiner: Well, now, how much would it cost Mr. Pierce to sell a fee title to that?

Mr. Dotson: May I see the lease?

Mr. Pierce: May I answer the question?

Hearing Examiner: No, I am asking your attorney now. We can take your statement at a later time. Why, if Mr. Pierce knows what it would cost to develop this into a fee interest for transfer or sale, he could state it.

Mr. Dotson: Well, before he states that, I might state that there are three methods under which you can obtain the fee title to this small tract land. One, there is an acre rental which must be paid regardless and during the period the lease extends, you can construct what they call a homestead dwelling, and there are contractors who will build that for \$1,250.00 on the property or lease.

After you have done that, you get the approval of the Bureau of Land Management. They come down and inspect that, [639] and upon that they sell the land to you. Generally speaking, the price per acre is stated, and I know of some priced at \$50.00 an acre.

Hearing Examiner: What does that mean?

Mr. Dotson: That would be the price after you put the construction on.

Hearing Examiner: To whom is that paid?

Mr. Dotson: To the Government. Then you get a patent.

Hearing Examiner: What is the difference between a patent and a fee?

Mr. Dotson: The patent is the absolute title given by the Government. But since this lease was executed, as I explained the other day, there have been these other options that have come up. The Government will establish through the San Francisco office a purchase price at which you can buy this land and nothing else need be done.

Then there is this additional order they call a third option by the homesteaders, which allows you to drill a well on the property. I don't know if there is an additional price or not.

Congressman Young was very helpful to the Homesteaders and I think he helped them to work out something.

Mr. Pierce: There is 100 feet and at \$3.00 a foot, it is \$300.00 and the whole deal would cost me \$550.00 to get the patent for the land. [640]

Hearing Examiner: How long have you had this?

Mr. Pierce: Since 1950.

Hearing Examiner: It isn't in default or anything?

Mr. Pierce: No, it will not be in default until December of 1955.

Hearing Examiner: All right. Anything further? [641]

* * *

[Endorsed]: No. 14901. United States Court of Appeals for the Ninth Circuit. John Pierce, Petitioner, vs. Securities and Exchange Commission, Respondent. Transcript of the Record. Petition to Review an Order of the Securities and Exchange Commission.

Filed: November 16, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14901

JOHN PIERCE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMIS-
SION,

Respondent.

PETITION FOR REVIEW OF ORDER DENY-
ING APPLICATION FOR REGISTRA-
TION AS A BROKER AND DEALER

To the Honorable the United States Court of
Appeals for the Ninth Circuit:

The petition of John Pierce respectfully shows:

1. This Petition for Review is filed pursuant to the provisions of Section 25 (a) of the Securities Exchange Act of 1934 (15 U. S. C. 78 y).

2. Your Petitioner resides in and has his principal place of business at Las Vegas, Nevada, within the Ninth Circuit.

3. On October 28, 1954, your petitioner filed with the Securities and Exchange Commission an application for registration as a broker and dealer pursuant to Section 15 (b) of the Securities Exchange Act of 1934 (15 U. S. C. 78 (o) (b)). On

November 5, 1954, the Securities and Exchange Commission ordered that a hearing be held, pursuant to said Sec. 15 (b), on the question of denial of registration to applicant.

4. Thereafter, a hearing was held before a Hearing Examiner at Los Angeles, California, in November and December 1954 pursuant to said order. At said hearing it was stipulated that the Commission might make an order postponing the effectiveness of your petitioner's application for registration. Such order was made.

5. On February 8, 1955, the Hearing Examiner filed in said proceeding a 44 page Recommended Decision which recommended that your petitioner's application for registration as a broker and dealer become effective forthwith.

6. Your petitioner requested the Securities and Exchange Commission to adopt the Recommended Decision of the Hearing Examiner who heard the evidence.

7. On August 16, 1955, the Securities and Exchange Commission adopted a 9 page Findings and Opinion which did not discuss the Recommended Decision of its Hearing Examiner, and entered an order denying your petitioner's application for registration as a broker and dealer.

8. A Petition for Rehearing has been filed by your Petitioner but has not been acted upon by the Commission.

9. Petitioner seeks review by this Court of the order of the Securities and Exchange Commission dated August 16, 1955, denying his application for registration as a broker and dealer. Petitioner is an aggrieved party within the meaning of Section 25 (a) of the Securities Exchange Act of 1934 and alleges (and he urged to the Commission) that the order sought to be reviewed is contrary to law, is based on an opinion which misstates the facts developed in the record, which disregards the findings of the Hearing Examiner based on the evidence, and that the order is not supported by the evidence. The penalty imposed on your applicant, who has already been suspended over ten months, is cruel, unusual, and excessive. The Commission's Opinion and Order denying broker and dealer registration is unreasonable and arbitrary and does not give the weight to the Recommended Decision of the Hearing Examiner (favorable to your Petitioner) required by law and the decisions such as *Universal Camera Co. vs. N. L. R. B.*, 340 U. S. 474, 487-496.

No previous application for the relief sought in this petition has been made to any court or judge.

Wherefore your Petitioner prays that this Court review said order of the Securities and Exchange Commission dated August 16, 1955, and order that it be set aside so far as it denies your petitioner's application for registration as a broker and dealer pursuant to Sec. 15 (b) of the Securities Exchange Act of 1934.

Respectfully submitted,

JOHN G. SOBIESKI,

DOUGLAS L. HATCH,

EDWIN J. DOTSON,

By /s/ JOHN G. SOBIESKI,

Attorneys for Petitioner.

Duly Verified.

[Endorsed]: Filed October 14, 1955.

[Title of Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS

To the Honorable the United States Court of Appeals for the Ninth Circuit:

Pursuant to the provisions of Rule 17 (6) the Petitioner, John Pierce, hereby files with the Court his statement of the points on which he intends to rely and designation of the record material to the consideration thereof.

I.

Points on Which Petitioner Intends to Rely

a. The order of the Commission issued August 16, 1955, denying Petitioner's application for registration as a broker-dealer is based upon findings which are contrary to the record and are not supported by the evidence. The findings to which Petitioner specifically objects are those relating to his

transactions with Mr. "H." and those relating to his financial statement. Petitioner concedes that he did act as a broker-dealer while unregistered and now desires to correct that.

b. Said order does not give proper weight, as required by law, to the Recommended Decision of the Hearing Examiner who heard the evidence, which Recommended Decision was favorable to Petitioner.

c. The penalty imposed upon Petitioner, who has already been denied a right to earn a living as a broker and dealer for a period of over eleven months is cruel, unusual, and excessive.

Respectfully submitted,

JOHN G. SOBIESKI,

DOUGLAS L. HATCH,

EDWIN J. DOTSON,

By /s/ JOHN G. SOBIESKI,

Attorneys for Petitioner.

[Endorsed]: Filed November 22, 1955.

No. 14901

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN PIERCE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONER'S OPENING BRIEF.

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FILED

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PAUL P. OWEN, CLERK

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No. 14901

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN PIERCE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONER'S OPENING BRIEF.

I.

**STATEMENT OF PLEADINGS AND FACTS
SHOWING JURISDICTION.**

This is a Petition to Review an Order [R.* 250] of the Securities and Exchange Commission (hereinafter referred to as the Commission) made on August 16, 1955, denying Petitioner's application for registration as a broker-dealer. Petitioner, John Pierce, resides in Las Vegas, Nevada. [R. 210.] Section 25(a) of the Securities Exchange Act of 1934 (hereinafter referred to

*References herein are to the Transcript of Record which is in two volumes. The first volume is printed. The second volume, to save expense, binds the Recommended Decision of the Hearing Examiner, and the Commission's opinions in their original form. Pages within parts of Vol. II are indicated by a dash and then their number. Example: Page one of the Recommended Decision would be [R. 249—1].

as the "Act") (15 U. S. C. 78y) authorizes the Court of Appeals for the Circuit within which the "aggrieved party" resides to "affirm, modify and enforce, or set aside such order in whole or in part" upon application filed with the Court within sixty days after the making of the order complained of. The Petition for Review of the Order of August 16, 1955, was filed in this Court on October 14, 1955. [R. 247.]

II.

STATEMENT OF CASE.

On October 28, 1954, John Pierce, the Petitioner herein, filed an application with the Commission for registration as a broker-dealer.* [R. 3-8.] On November 5, 1954, the Commission ordered that a hearing be held at Los Angeles to determine whether the application for registration should be denied. [R. 9-19.] (As a result the application never became effective.)

A hearing was held in November and December, 1954, before the Hearing Examiner appointed by the Commission. (An Examiner with over twenty years' service as such.) Both sides elaborately briefed the case and on February 8, 1955, the Hearing Examiner filed his 44-page Recommended Decision which concluded that Pierce's application for registration should "become effective forthwith." [R. 249—43.] On August 16, 1955, without discussing *any* of the findings of the Hearing Examiner favorable to Pierce, the Commission entered an order

*Section 15a of the Act (15 U. S. C. 78(o)(a)) requires registration with the Commission of every broker and dealer who uses the mails in his business except one whose business is "exclusively intrastate". Such registration automatically becomes effective thirty days after filing the application therefor unless the Commission suspends or denies it after a hearing. (15 U. S. C. 78(o)(b).)

denying registration. [R. 250.] On October 24, 1955, the Commission denied a rehearing and denied request for oral argument. [R. 251.] This petition for review followed.

The order for hearing, dated November 5, 1954, as supplemented and amended from time to time by the Commission, made, in general, the following charges:

- a. That since approximately January 1, 1951, Pierce had acted as a broker-dealer without being registered;
- b. That during said period Pierce was guilty of fraudulent conduct in approximately six transactions;
- c. That the financial statement filed by Pierce with his application understated his liabilities by approximately \$3,000.

Pierce's position on these charges is, and was, as follows:

1. He did act as a broker-dealer without registration. (His application is to correct that.)
2. He was not guilty of fraud in any of the transactions. On this score the Hearing Officer found: "I find no dereliction of duty or violation of any of our Acts chargeable to the Respondent." [R. 249—32.] (The Commission's order found fraud in but one transaction.)
3. Respondent did omit \$3,000 of liabilities from his balance sheet. He claims it was inadvertent; the Hearing Examiner so found [R. 248—38, 39] and found additionally he also inadvertently omitted an asset larger than the liability. [R. 248—36.]

Petitioner's view is that his conduct, in any event, doesn't warrant that he be forever denied registration,

as the Commission apparently intends. (Pierce has already been denied registration for over a year and a half.)

Furthermore, it is our view that the one case (out of several hundred transactions) in which the Commission found fraud was not a case of fraud.

The Commission's Opinion, as previously mentioned, fails to discuss *any* of the findings of the Hearing Examiner whose findings were favorable to Pierce. In addition, as will be pointed out in detail hereafter, the Opinion, wrongly, we think, describes as clear cut and certain that which the record (and the Hearing Examiner's Recommended Decision) shows was informal and uncertain. (Nearly three years elapsed between the transaction and the testimony about it.) Significantly, the Opinion omits reference to the favorable findings of the Hearing Examiner as to Pierce's "responsibility in dealing with his customers." [R. 249—31, 32.] (Pierce had offered to refund to a customer in one case where there was a misunderstanding and made a refund in another case where not legally obligated.) [R. 249—31, 32.] Significant, we think, is the Opinion's failure to disclose that Hayward, the customer in the sole case where it found fraud, was an experienced businessman [R. 64] who regards Pierce as honest [R. 93], who never made a complaint to the Commission [R. 88], and never even criticized Pierce.

It is fundamental that

"The one who decides must hear." (*Morgan v. United States*, 298 U. S. 468, 481 (1936).)

In this case the one who heard (the Hearing Examiner) recommended for Pierce.

Furthermore:

“The committee reports also made it clear that the sponsors of the legislation (the Administrative Procedure Act) thought the statute gave significance to the findings of the examiner.” (*Universal Camera v. N. L. R. B.*, 340 U. S. 474, 496.)

It is our view that the record shows the Commission's Order wrongly fails to “give significance” to the findings of the Hearing Examiner favorable to Pierce.

III.

SPECIFICATION OF ERRORS.

A. The order of the Commission issued August 16, 1955, denying Petitioner's application for registration as a broker-dealer is based on findings which are contrary to the record and are not supported by the evidence.

B. Said order does not give proper weight, as required by law, to the Recommended Decision of the Hearing Examiner, who heard the evidence, which Recommended Decision was favorable to Petitioner.

C. The penalty imposed upon Petitioner, who has already been denied the right to earn a living as a registered broker-dealer for a period of over a year and a half, is cruel, unusual and excessive.

IV.

ARGUMENT OF CASE.

A.

Petitioner's Transactions With Earl B. Hayward Did
Not Involve Fraud.

The stock involved in this transaction was stock of the Las Vegas Racing Corporation. By September of 1951 the money raised by the public sale of stock was exhausted and the race track was uncompleted. [R. 60.] In January, 1952, an involuntary creditor's petition was filed under Chapter X of the Bankruptcy Act. [R. 60.] In March, 1952, a trustee under Chapter X of the Bankruptcy Act was appointed and reorganization followed. [R. 61.] Although the track was completed the reorganized corporation failed in 1954. [R. 62.]

(1)

The Record Shows That There Was No Fraud.

Petitioner claims that the Commission's Opinion does not correctly summarize the facts. The details of the Hayward transaction are, as in all cases where fraud is charged, important. Petitioner believes the fairest way to present the details is to quote verbatim the analysis of it by the Hearing Examiner found on pages 11-24 of his Recommended Decision (with which Petitioner agrees). (Where the Hearing Examiner cited the typewritten transcript we have changed the references to the appropriate page of the printed record.)

"EARL B. HAYWARD TRANSACTION.

The testimony concerning the Hayward purchases and sales of the Racing Association stock is confusing. Units sold and total amounts are in dispute. Paragraph IIB(a)(1) to (8) of the Commission's

order alleges that Respondent, in February, 1952, 'solicited and induced' Hayward to entrust to Respondent, for the purposes of sale, 1,000 units of Racing Association stock and that Respondent would sell a portion thereof at \$3 per unit and the balance at \$4 per unit. It is further alleged that Respondent sold the units at \$6 each and converted a portion of the proceeds to his own use, causing Hayward to believe that the units had been sold only for \$3 and \$4 per unit. During the public offering of the Racing Association stock, Hayward purchased through Respondent 3,000 units for \$15,000. Thereafter, Respondent inquired of Hayward if he wanted to sell any or all of this stock. Hayward said he was not interested. [R. 65-68.]

The evidence discloses that Hayward, who is 44 years of age, is a competent business man, owns and operates the oldest floor covering business in Santa Barbara, California, and employs some 50-odd men and uses 18 trucks in his business. He is also experienced in the building industry and can tell whether real progress is being made in building a race track. [R. 107-108.] In 1951, a friend of his, a Dr. Pierson by name, suggested to Hayward that they go to Las Vegas and look over the race track then under construction and buy stock in it if they liked it. Hayward went to Las Vegas and bought \$15,000 worth of units (a unit consists of one share of preferred and one share of common stock at a price of \$5 per unit) from Respondent, who was then a salesman for the underwriter. [R. 61-66.]

The evidence is clear, and I find, that Hayward was neither solicited nor induced to purchase or to sell these 1,000 units of Racing Association stock from Respondent, but on the contrary the testimony shows that it was through his friend in Santa Barbara, Dr. Pierson, that '* * * I became interested

in an investment of that type (referring to Racing Association stock), because he was subsequently interested in a like deal, and we went over there (to Las Vegas from Santa Barbara) together to look at the situation and to buy stock if we liked it, which we did, and we both (Hayward and Pierson) bought stock at that time. I bought * * * a thousand shares at that time.' [R. 65.]

Thereafter, in September, 1951, the race track, not having been completed and the issuer had spent all his money, a creditor's petition for involuntary bankruptcy reorganization under Chapter X of the Bankruptcy Act was filed in the Federal Court in Nevada in January, 1952. At a time shortly prior to these dates Hayward, with knowledge of the lack of progress being made in completing the race track, became dissatisfied with his purchase and asked Respondent if he would not sell some of his stock and get some of his money back, saying that he wanted to 'get all out that he could,' that he wanted to 'get \$5 per share for them, what I paid for them' and that he was interested in 'getting out what I had in it.' [R. 68-69, 99-103.]

The evidence is clear that Hayward went to Las Vegas and after looking the race track over, decided to sell his Racing Association stock. He stated that he had become disturbed at developments at the track and the decision to sell at that time was his own. 'I drew my own opinion of the situation.' [R. 96-106.] Hayward said he decided to sell before it blew up. The Hearing Examiner asked him if he was able to independently draw a conclusion as to what progress was being made at the track in completing the facilities and he stated that he was really wised up on these things. [R. 107-108.]

Respondent was not responsible in inducing Hayward to sell his stock. The evidence shows that on at least one prior occasion Hayward declined to sell when Respondent asked him if he would like to do so and in the light of Hayward's own knowledge of construction business and his concern at the lack of progress being made in the completion of the track at Las Vegas, I conclude that Hayward made up his own mind to sell his Racing Association stock, and thereafter he and Respondent '* * * did settle on an agreed amount' for the stock.

Hayward testified [R. 99]:

'Q. When did you settle on that agreed amount?
A. When I sent him (Respondent) the shares of stock through the mail. I sent him a thousand shares, and that was the agreement.

Q. What was your agreement? A. The agreement was that I was to get \$3 for the first 200 shares and \$4 for the balance * * *.'

Shortly prior to February 21, 1952, Hayward sent certificates for 1,000 units of Racing Association stock by mail from Santa Barbara, California, to Respondent at Las Vegas, Nevada. [R. 71; CX 6.]

Staff counsel contends that Respondent told Hayward that he could not sell the stock for \$5 a share, but that \$3 and \$4 per unit was all he could get. [R. 115-122.] Hayward stated that he had no independent information concerning the price of the stock and that relying on Respondent's representations he, Hayward, agreed to sell 200 units at \$3 per unit and the balance at \$4 per unit. [R. 99-118.] Thereafter, Hayward said he considered himself bound by this agreement. Staff counsel contends that Respondent was to sell the stock for Hayward and not, as Respondent testified, he would buy the stock from Hayward. [R. 211-212.]

As a result of observing witness Hayward giving his testimony, I feel that he made little, if any, distinction as to the real meaning of the leading questions put to him by staff counsel. These leading questions should have been objected to as they had a tendency to lead the witness in a field in which he had little understanding as to brokerage terms and the result was to put words in Hayward's mouth. In referring to the vague oral agreement as to how much he wanted to get for this Racing Association stock which he was turning over to Respondent, he stated that after the agreement to get \$3 a share for the first 200 and \$4 a share for the remaining 800, that this was the arrangement which had been made and he was ready to stand by it. [R. 70-71.] As previously shown, he stated that the thing he regarded as important was the fact that they (Hayward and Respondent) had settled on an 'agreed' amount. [R. 99.] Hayward did not remember whether these figures had been suggested by Respondent or not. His specific reply was 'I don't recall actually * * * honestly I can't tell you.' [R. 105, 106.] Thereafter, Hayward stated that since he had an agreement with Respondent, he did not consider it any of his business what Respondent sold the shares for so long as he got \$3 and \$4 per unit. In fact, his precise testimony on this point is as follows [R. 97-98]:

Q. And the oral arrangement was that you were to get \$3 for 200 shares and \$4 for the balance, is that correct? A. That is right.

Q. And that was irrespective of what Mr. Pierce (Respondent) would get for the shares, is that correct? A. That is right.'

The leading and suggested questions previously adverted to were improper in that there was no show-

ing that witness Hayward knew the difference between selling the stock to Respondent or having Respondent sell it for him. In the one instance here, there is a principal-dealer relationship and in the other, there is a broker-agency relationship, a distinction with a real difference. The legal responsibilities in the two different relationships are vastly different and distinct. Again, Hayward was hazy and indistinct in his recollections. This is not an unusual experience for an energetic and busy man engaged in his own business operations, yet on the other hand, Respondent, in forthright and unambiguous fashion, testified that he told Hayward that he 'would buy the stock from him.' Specifically on this point Respondent stated:

Q. And can you tell us the conversation (relating to disposing of Hayward's stock)? A. Well, he asked if I could find or dispose of a thousand shares of his race track stock and * * *

Q. When you say shares * * * A. Units. Units of race track stock.

Q. And what did you tell him? A. Well, I said that I didn't know. * * *

Q. Was this something that you said to him? A. Yes. One week there would be a rumor that the stock was hard to get because somebody said that they would finish the race track and then the next week there would be a rumor that nobody would ever finish the race track and every other day there seemed to be a difference of opinion of whether the stock was desirable or not. However, I told him that I would buy the stock from him at the rate of \$3 a share, a unit, for 200 units and \$4 a unit for the balance of the 800 units. * * *

The Witness (Respondent): I said "Earl (referring to Hayward) this is net to you." I said "Is

that all right with you?" And he (Hayward) said "yes." [R. 211-212.]

Hayward testified that Respondent stated in connection with this somewhat uncertain oral agreement [R. 69-70]:

'Hearing Examiner: What did he (Pierce) say to you and what did you say to him, as near as you can recall?

The Witness (Hayward): Well, of course, I wanted as much as I could get of what I paid for it out of the stock, and—but I think, as we talked, he said, "well, first, if I get you \$3 a share for the first 200 shares and \$4 a share for the 800 shares, that's what we will do."

And I agreed to that, and that's what the arrangements were that were made.'

Thereafter, Hayward again stated 'But the thing I think is important is the fact that we did settle on an agreed amount.' [R. 99.] And of further importance is his statement that he did not recall whether the figures of \$3 and \$4 per share had ever been suggested by Respondent.

As a result of reading all of Hayward's testimony, there is justification to conclude that his vague oral agreement to sell the stock to Respondent was such that he did not regard it as his business what the latter sold the shares for so long as he got \$3 and \$4 per unit. [R. 94-125.]

As an indication of the witness' confusion in his testimony, staff counsel Tucker asked the following leading questions and the witness gave the following replies [R. 95]:

'Q. Well, now, as I understand your testimony, in those letters, Mr. Pierce was to sell that stock for you? A. Yes, sir.

Q. You weren't selling it to him; he was to sell it for you, is that correct? A. Yes.'

One page away, at page 96, under further recross-examination, defense counsel Sobieski asked the following questions and the witness gave the following answers:

'Q. And as I understand it, your understanding with Mr. Pierce was that you were to get \$3 a share for 200 shares, and \$4 for the balance, is that correct? A. Yes.

Q. And as long as you got that amount, you were satisfied, is that correct? A. Correct.

Q. And you never asked Mr. Pierce what he sold it for? A. No.

Q. And he never told you? A. No.

Q. And you weren't interested in what he sold it for, is that correct? A. No.'

On pages 96-98, the following colloquy between defense counsel and the witness occurred:

'Q. * * * now, prior to the time you decided to sell these shares, Mr. Hayward, you had become disturbed over the developments in the tract, is that correct? A. Yes.

Q. So the decision to sell at this time was your decision, is that—the one that you had made? A. That's right.

Q. Made from your own study of the situation? A. My own calculation of what I had decided I had better do.

Q. Yes. A. Before it was really too late.

* * * * *

A. So I drew my own opinion on the situation.

Q. Well, now did Mr. * * * when you say you drew your own conclusions, was this the result

of your investigation independent of Mr. Pierce? A. My own observation. I had been over there, yes.

Q. Yes and then after that, then you had this oral arrangement with Mr. Pierce, is that correct?

A. That's right.

Q. And the oral arrangement was that you were to get \$3 for 200 shares and \$4 for the balance, is that correct? A. That's right.

Q. And that was irrespective of what Mr. Pierce would get for the shares, is that correct? A. That's right.'

The above conflicting testimony indicates the difficulty a finder of facts has in appraising the true situation involved.

Of some importance in arriving at a final determination as to what Hayward's attitude was in this transaction is the following colloquy, which occurred during the course of the proceedings [R. 102]:

'By Hearing Examiner:

Q. You said something a while ago about \$3 and \$4 per share, * * * "irrespective of what Mr. Pierce was to get for the shares." I think that was in answer to a question put to you by Mr. Sobieski, "\$3 or \$4 irrespective of what Mr. Pierce was to get for the shares." Was that your understanding? You didn't care whether he sold them for \$10 or \$20, just so you got \$4, is that your testimony? * * * That is all I want to know. A. Yes.'

Commission counsel also states that at no time did Respondent disclose to Hayward the price at which he sold Hayward's 1,000 units to purchasers Fox and Ramlos at South Gate, California. As above shown, Hayward testified that he never asked Respondent what he had sold the shares for. If, in effecting these transactions with Hayward, Respondent acted as principal-dealer, and I find that he did,

there was no burden thrust upon him to make the voluntary disclosure to Hayward. Hayward's testimony that he did not care if Respondent sold the units at \$10 or \$20 per share overweighs any other verbal agreement between Respondent and Hayward which, at best, is uncertain and vague. The verbal agreement, as the result of its vagueness and uncertainty, is contrary to the greater weight of the credible testimony of the parties involved herein.

The Commission's order alleges that this transaction is a fraudulent one and that Respondent converted certain proceeds from the sale of these units to his own use. The facts which follow do not justify this conclusion.

I find, and the evidence shows, that Hayward, pursuant to the verbal understanding, sent to Respondent certificates for 1,000 units of the Racing Association stock on March 3, 1952, and that Respondent sent Hayward a letter enclosing a \$600 payment for part of the shares [CX 1; R. 66-73.] By March 28, 1952, Respondent had sold all of Hayward's 1,000 units and had received a total of \$6,000. On May 14th, Respondent sent Hayward a check for \$800, which was dishonored for insufficient funds. [CX 3; R. 72.] This was also in part payment for the shares. Thereafter, Respondent made this check good in September, 1952. As previously shown, Hayward testified that some time prior to September, 1952, Respondent told him that he had sold the stock and that there would be a delay in paying Hayward the balance due Hayward. Hayward stated that it was agreeable to him since he knew he would get his money and he was willing to grant Respondent a delay in paying the balance of the money due him. [R. 84.] There is credible testimony that Hayward agreed to regard the money due him from Respondent as a loan. [R. 213-214.]

'The Witness (Pierce): My best recollection is that I went to Santa Barbara to give him (Hayward) the \$800 for this check; it was very nearly around that date and I discussed the balance of the money with him there.

* * * * *

Q. Now, at that time, did you have a discussion with Mr. Hayward? A. Yes, I did.

Q. And what is your best recollection as to what was said by you and by Mr. Hayward in this discussion? A. I explained to Earl that I wanted to borrow the balance of the money that he had coming to him and I asked him if it would be possible for me to do that and he said that it would be all right.

Hearing Examiner: How much was that balance, Mr. Pierce, do you recall it?

The Witness: \$2400.

Hearing Examiner: That was what was left after you paid him the \$800 in cash?

The Witness: \$800 and \$600.

* * * * *

The Witness: That is right.'

This testimony should be compared with Hayward's above testimony in connection with this same transaction [R. 84]:

'Q. * * * Mr. Pierce talked to you either in person or over the phone, and in which he said that there would be a delay in paying you the balance of the money coming to you? * * * A. Yes, that's right.

Q. And what did you say to that, Mr. Hayward? A. It was agreeable to me. I knew I would get it.

Q. You were willing to grant him the delay, is that correct? A. Yes.'

No further payments were made to Hayward until about June, 1954, when Respondent paid him \$200 and gave Hayward a note for the balance due of approximately \$2,200. After the time of the giving of this note in June, 1954, Hayward, after consulting his attorney, executed a statement that all his claims against Respondent had been settled. [RX 1; R. 73-83.]

In the light of the aforementioned testimony, although contradictory in part and confusing and indecisive in other parts, I find that the evidence is insufficient to hold that Respondent converted to his own use any of Hayward's units of Racing Association stock, or the monies resulting from the sale thereof. Hayward is a competent, successful and shrewd business man. It appears that Hayward, regardless of some preliminary statements appearing in the record, was not actually concerned at what price Respondent sold his shares for. I cannot conclude that Respondent was acting as an agent in this situation. On the contrary, it appears, and I so find, that Respondent was acting as a principal and he was selling shares at a prior fixed and determined price. The mere fact that Hayward testified that he was 'satisfied' with the transaction and that he believed Respondent was 'honest' [R. 93, 96] and furthermore that he made 'no complaint' [R. 88] to the S. E. C. about this matter is of little significance, for if Respondent actually misled Hayward and acted other than as a principal or dealer I would, without hesitation, conclude that the dealings involved a breach of confidence. Mr. Hayward is an experienced business man and the charges of fraud involved in this transaction, in the light of the record testimony, have not been proven.

In conclusion, I find that Respondent did not act as an agent and broker for Hayward and that the evidence is insufficient to hold that he engaged in the sale of securities by manipulative, deceptive and other fraudulent devices in contravention of Section 15(c) (1) of the Exchange Act of 1934 and of certain rules thereunder, nor did he engage in acts, practices and any course of business which operated as a fraud and deceit upon the said Earl B. Hayward in willful violation of Section 10(b) of the Exchange Act of 1934 and certain rules thereunder.”

The foregoing well-reasoned and judicial analysis of the record by an experienced Hearing Examiner, who heard the evidence, clearly shows there was no fraud. We adopt it as our argument.

(2)

The Contrary Findings of the Commission Are Not Supported by the Record.

(a) The Commission's Opinion found a mistatement as follows: Applicant represented “to Mr. H. in February, 1951 (*sic*, the Commission probably meant 1952) [R. 250—5] that he could not obtain \$5 per unit for Racing Association stock although he knew that Mr. F. and his associates were definitely desirous of acquiring from him for \$12,000 to \$15,000 units at \$6 per unit * * *” [R. 250—7.] Only by ignoring a large part of the evidence, and misstating or distorting the rest, can support be found for this finding. This finding rests solely on a vague statement by an unreliable witness, Mr. Fox.

The Hearing Examiner says this of Fox's testimony: “Mr. Fox, an elderly druggist, changed his testimony on many occasions and in consequence of these vacillations,

I attach little credence to his testimony. He appeared to be not only confused, but actually to know few of the details concerning this transaction.” [R. 249—27.] With reference to the Terry Drilling Company transaction, occurring only a year before the hearing (and thus two years after the disputed statement) the Hearing Examiner says this: “The record discloses that Mr. Fox was hazy or unclear as to exactly what happened. He frequently used the expression ‘I gained the impression’ and the like in testifying.” [R. 249—29.] “Most of these Fox statements appear to be his own indistinct conclusions—not facts which he remembers.” [R. 249—30.]

Mr. Fox first referred to the statement in answering a question as to how much he told Pierce, in November, 1951, that he was willing to invest right then, that November.

“Q. Do you recall how much you wanted to buy at that time? A. Mrs. Fox and I decided that we would probably—

Mr. Sobieski: Object as calling for a conclusion from the witness, hearsay.

Q. (By Mr. Tucker): Is there something you told Mr. Pierce about it? A. Yes.

Q. All right, what did you say to him about it? A. We had decided we would allocate twelve to fifteen thousand dollars for stock in the Las Vegas Racing Association.” [R. 154.]

Thus, if Fox did make such a statement to Pierce he was talking about how much money he was willing in November, 1951, to spend in November, 1951.

In January, 1952, an involuntary bankruptcy reorganization of the Racing Association was instituted. [R. 60.] In the face of such an event, Pierce could not have been

justified in relying on any verbal statement of Fox's intentions, made in November, regardless of how firm and clear cut they were, which these were not.

Pierce did make a sale to Mr. Fox in February, 1952. The circumstances of this sale show clearly that Pierce was not then acting on the alleged statement and at that time did not have any reason to do so. The sale was made pursuant to a specific request in February. Pierce's letter of February 21, 1952, to Fox states the stock was sent "pursuant to your request," and later, "pursuant to our telephone conversation." [R. 45.] Further, Pierce wrote, "Therefore, if you or any of your friends want any additional units, please advise me at your earliest convenience and I will attempt to purchase same for you." [R. 46.] Fox also mentioned this phone call in a somewhat vague sort of way.

Q. With respect to Exhibit 6 and prior to the receipt by you of Exhibit 6, did you have any conversation with Mr. Pierce about further purchase of stock in the Association at or about that time? A. Mr. Tucker, which is Exhibit 6?

Q. The yellow one dated February 21. A. I see. Oh, yes, I talked to him.

Q. When and where did you talk to him, to the best of your recollection? A. I think, I know I talked to him on long distance over the phone.

Q. About when was that? A. It might have been along in June.

Q. I was referring to at or about February 21. A. You mean regarding this?

Q. Regarding that. A. Well, I must have talked to him a few days before February 21.

Q. Can you recall specifically? A. I can't, Mr. Tucker. That's three years." [R. 158.]

Thus, it appears that the stock Fox bought in February, 1952, was purchased in accordance with a telephone conversation that month and not pursuant to the alleged statement of November, 1951. The parties did not act on the alleged statement. Did they still believe it a valid statement of intentions? The sentence in Pierce's letter of February 21, 1952, to the effect that Fox should let him know if he wanted "any additional units" [R. 46] is eloquent testimony that they did not. Pierce does not say *when* you want any more; he says *if* you do. Note, that at this time Pierce had at least 500 more shares available [R. 41], and Fox's total expenditures were only \$6,000. [R. 149, 163.]

Thus, the charge of fraud against Mr. Pierce for telling Mr. Hayward in early 1952 that the price of \$5 per unit for 1,000 shares was not obtainable because he allegedly knew Fox wanted to buy \$15,000 worth collapses as not supported by the evidence. We have shown that the evidence the statement was ever made was weak; that if it was made the witness testified it referred to how much he desired in November, 1951, to spend in November, 1951; and that all reliance which might have been placed on it in November, 1951, was destroyed by the bankruptcy proceeding against the Racing Association in January, 1952. We have further shown that Fox and Pierce in their next transaction (Feb., 1952) acted without reference to the statement and, in fact, in a manner indicating that it had never been made.

(b) The Commission's Finding that Pierce undertook to secure for Mr. Hayward the best price obtainable for Hayward's stock [R. 250—6] is contrary to the record. This matter was analyzed at length in the Hearing Examiner's Recommended Decision quoted above. He closely questioned Hayward on this after considering all the evidence, oral and documentary. The following question and answer appear decisive:

“Q. (By Hearing Examiner): —Was that your understanding? You didn't care whether he sold them for \$10 or \$20 just so you got \$4, is that your testimony? That is all I want to know. A. (By Mr. Hayward): Yes.” [R. 102.]

If Hayward “didn't care” whether Pierce sold the shares for \$10 or \$20 so long as he himself got \$4 per share it obviously couldn't be fraud for Pierce to sell the shares at \$6. This is fully analyzed by the Hearing Examiner. But since the Commission's entire case rests on this point, this decisive testimony of the customer involved, ignored in the Commission's Opinion, deserves mention.

B.

The Error in the Financial Statement Was Not Wilful.

The facts are correctly set forth in the Hearing Examiner's analysis of the evidence, which analysis shows the omission wasn't wilful. Petitioner here adopts those findings [pp. 32-39] of the Recommended Decision as his argument, changing the page references to conform to the printed Record.

“FINANCIAL STATEMENT.

Assets and Liabilities as of October 26, 1954.

The December 1, 1954 amendment to the Commission's order alleges that the statement of financial condition, dated October 26, 1954, filed with the Commission on October 28, 1954, as part of the application for registration, omitted liabilities in the amount of \$3,000. Respondent listed miscellaneous liabilities at \$500. The statement which he filed follows:

Financial Statement
of
John Pierce
October 26, 1954

ASSETS

Cash	\$ 3,000.00	
House and Furniture		
1021 Bracken, Las Vegas	20,000.00	
Cadillac Automobile	5,500.00	
Jewelry & Miscellaneous	3,500.00	
Showboat Hotel Inc. Stock	2,100.00	
Total Assets		\$34,100.00

LIABILITIES

Mortgage on house	\$ 9,000.00	
Mortgage on car	1,500.00	
Misc.	500.00	
Total Liabilities		\$11,000.00
Net Worth		<u>\$23,100.00</u>

State of California, County of Clark, ss.

John Pierce, being sworn, deposes and says: The foregoing financial statement is true and correct to the best of my knowledge and belief.

/s/ JOHN PIERCE
John Pierce

Subscribed and sworn to before me this 26th day of October, 1954.

EDWIN J. DOTSON

Notary Public in and for said County and State.

Seal

My Comm. Expires 2/19/58

Commission's counsel contends that the statement of unsecured liabilities of \$500, instead of \$3,000, is a material misstatement and that it tended to conceal from the Commission the fact that the obligation to witness Hayward was still unpaid. Respondent concedes that the liabilities should be stated at \$3,000, but that the omissions from the financial statement were inadvertent and not willful. He also contends that he inadvertently omitted from the statement a government lease and option owned by him of a value of at least equal to the omitted liabilities. Staff counsel urges that Mr. Burr, of the Los Angeles office, had previously told Respondent [R. 140] that there was outstanding a debt to Hayward in the amount of approximately \$2,400 and that the omission was not an oversight and could, and should, have been corrected in the subsequent financial statement which was filed. He also urges that a financial statement appended to any application for registration is a public record and its use is not confined to the limited purpose of the Commission's own information, but that it may be relied upon by the public in determining, among other things, the amount of credit that

may be safely extended to the Registrant, or the extent to which transactions in securities or other transactions depended upon his current ability to respond financially should be entered into.

It should be noted at this time, however, that this is merely an application for registration and the public is not at this time relying on these statements. I shall discuss this aspect at greater length shortly. Respondent, during the course of the proceedings, recognized the necessity for filing a corrected statement. [R. 214, 215.] His testimony follows:

‘By Mr. Sobieski:

Q. Mr. Pierce, with reference to the financial statement which is attached to your application for registration, the item of indebtedness shows under the heading of “Miscellaneous” the sum of \$500. Do you intend to file an amendment to your application?

A. Yes, I do, as soon as we get through with the hearing.

Q. And the correct figures should be approximately \$3,000, is that correct? A. Yes, sir.’

Respondent, as aforesaid, forgot to include in the financial statement an asset consisting of a five-year Lease Under Small Tract Act covering five acres of land near Las Vegas, Nevada. [CX 35; R. 215.] This lease was sent to one Fox about August 25, 1953 as security for an obligation owed by Respondent to Fox, but it was not formally assigned. [R. 228, 229.] In the lease, there is a prohibition against assignment without the consent of the United States. It contains a further provision that the lessee may purchase the described land after one year from its date if he has complied with the terms of the lease and has made certain improvements on the land. [CX 35.] Respondent testified, and there is other evidence in the record indicating that this leasehold

interest could ripen into a fee interest by the building of a small inexpensive house thereon or by drilling a well at an estimated cost of \$250. Respondent says he intends to take all necessary steps in short order to get the fee title to this lease. [R. 225-242.]

Assuming, without conceding for the time being, that this five-year lease is an asset which can be used in the financial statement, I find that properties, and interests in properties of this kind, are dealt in with some degree of regularity in the Las Vegas area and that interests such as these have substantial value if the property is well located. This tract is well located. Informed statements were made in the record that similar tracts in nearby areas were selling variously from \$1500 to \$2000 an acre.⁴

I find that when and if a small amount of money is spent to ripen the lease to this tract of land into a fee interest, that the property has a conservative value of at least \$7,500.

Rule X-15B-8 requires that an application for registration as a broker-dealer be accompanied by a notarized report of financial condition in such detail as will disclose the nature and amount of assets and liabilities and the net worth of the broker-dealer, as of the date within thirty days of the date on which

⁴See Dotson's statement [237-242 and elsewhere] and other credible testimony [R. 216-217]. During the course of the proceedings, the Hearing Officer indicated that he proposed to visit and view the tract of land in question with an informed broker of the Las Vegas area. He did so, accompanied by Mr. Dave McCoig, a well known and respected Las Vegas real estate broker, and found the tract of land level, with no gullies or gulches, and located in the Paradise Valley area near the Race Track and not far from the famed Strip, the site of the famous hotels and gambling casinos, and also found that expensive residences were in use and under construction nearby. Mr. McCoig stated that the property had a value, in his estimation, of not less than \$2,000 an acre and probably more. This estimate was based on recent sales, so he stated.

the report is filed. Ordinarily, applicants for registration are not engaged in business as brokers-dealers and consequently the net capital rule (X-15C3-1) is not applicable to them. However, the reports of financial condition are analyzed in the light of that rule, for the purpose of determining whether the applicant would be able to comply with it, if and when he commences business. This rule states that net capital shall be deemed to mean the net worth of the broker-dealer, that is, the excess of assets over liabilities adjusted by certain items, one of which is fixed assets or assets which cannot be readily converted into cash including, among other things, real estate less any indebtedness secured thereby.

Questions have arisen as to whether an applicant must show all of his assets and liabilities or only those relating to his broker-dealer business and the consensus seems to be that Rule X-15B-8 would ordinarily require a broker or dealer to disclose in his statement of financial condition the nature and amount of his assets and liabilities relating only to his business as a broker or dealer, provided, however, that if he has other assets or liabilities, not relating to his business and the excess, if any, of such liabilities over such assets would materially affect his net worth then he would be required to disclose also the amount of such excess.

For example, if an applicant has \$3,000 in liabilities not relating to his broker-dealer business and \$7,500 worth of assets not relating to his broker-dealer business, such assets and liabilities would not have to be disclosed because the liabilities do not exceed the assets. If, however, those liabilities are found to relate to his business as a broker-dealer failure to disclose them would be in violation of Rule X-15B-8. However, if they were disclosed, the ap-

plicant's net worth, as then shown, may not be materially different from that previously disclosed since he would be entitled to include in the report a sufficient amount of assets not relating to his business as a broker-dealer to offset the previously undisclosed liabilities.

On the basis of the balance sheet submitted as at October 26, 1954, and assuming that Respondent was subject to Rule X-153C-1, if the capital were computed according to Rule X-153C-1, Respondent's capital would be \$2,890 and his aggregate indebtedness \$2,000, so that he would be within the requirements of the Rule.

On the basis of including in his assets the five-acre tract of land located in Paradise Valley, reasonably near the famous Strip in Las Vegas, where the well known hotels and gambling casinos are located, at a value of \$5,000, and showing as liabilities an amount of \$3,000, his net capital would be \$390 and his aggregate indebtedness \$4,500 and he also then would be in compliance with the Rule.

Rule X-153C-1 requires that the indebtedness shall not exceed 2000% on a broker's net capital.

Where we find a broker-dealer, whose financial statement, when submitted under Rule X-15B-8 in support of his application for registration, the analysis of which, based upon Rule X-153C-1 shows an impairment in capital, it is customary to alert the Regional Administrator in whose jurisdiction the applicant may be in, and have him require the applicant to make such changes in the financial statement as the circumstances seem to warrant.

At any rate, the financial statement as of the present date is inadequate. An amendment to the statement would be necessary to bring it into focus. Respondent so concedes and urges that it was through

inadvertence that the omission to list additional liabilities occurred. In the light of the foregoing, there appears to be insufficient evidence to justify a finding of willfulness within the purview of our statutes and I so find.”

C.

The Public Interest Does Not Require Denial of Petitioner's Registration.

The findings on pages 39-43 of the Hearing Examiner's Recommended Decision properly develop this point. They are as follows:

“WILLFULNESS.

As previously set forth on pages 9 and 10 of these findings, I finally conclude that certain of the actions of Respondent in connection with his purchase and sale of securities for the account of others as a broker at a time when he was not registered with the Commission pursuant to Section 15(b) of the Act is willful. The reasons assigned therefor are set forth in footnote 3 on page 10. In engaging in such a course of conduct in the purchase and sale of securities by the use of the mails and other instrumentalities of interstate commerce, after having been admonished on several occasions by Mr. Burr, of the Los Angeles Securities and Exchange Commission office, that he should register, he displayed a somewhat callous disregard of the consequences of his acts and assumed the legal responsibilities arising from such conduct while he was engaged in the business as a broker and dealer without registration. In addition to the aforementioned cases defining willfulness, the Commission, in several other cases, has defined this term and has generally taken the view that gross carelessness, heedlessness, callous and reckless disregard of the conse-

quences of one's acts, certain types of ignorance and indifference and culpable acts of omission are sufficient to justify a finding that Respondent's statutory violations are willful.⁵ Even though he did not have a great many transactions in such capacity, nevertheless the transactions which he consummated were in violation of the Securities Act of 1933, as well as the Exchange Act of 1934 and the Commission's Rules and regulations thereunder. Other than the aforesaid willful acts, I do not find that any other willful violations have occurred.

Staff counsel urges that the weight of all of the evidence in these proceedings is such as to impel the conclusion that the public interest requires a denial of Respondent's application to register. Respondent, on the other hand, through his able counsel, urges that no penalty should be invoked in view of all of the circumstances in this proceeding, since Respondent has been exposed to a long and costly proceeding, that he has learned the errors of his ways and that these proceedings have forcibly impressed upon Respondent the necessity for being completely above board in the conduct of any securities transactions. It is further urged that the staff of the Commission has examined many of Respondent's transactions and they have come up with only six questioned ones and these have been shown to be not improper.

It is conceded that Respondent, for a period of time, operated as a broker and dealer. However, he now asks the opportunity to correct this and register with the Commission in order to be permitted to earn a living in the brokerage business.

⁵*Leedy, Wheeler & Co.*, 16 S. E. C. 299; *In the Matter of Rosenfeld*, S. E. C. Act Release No. 4656; *Securities and Exchange Corporation*, 2 S. E. C. 760.

PUBLIC INTEREST.

Even though Respondent may have been guilty of willful violation of certain provisions of the Securities Act, his application for registration as a broker and dealer may not be denied unless such action is found to be in the public interest.⁶

Denial, revocation or expulsion is a means of protecting the public interest against the activities of applicants, brokers and dealers who may violate the law. Its primary purpose is to prevent repetition of unlawful activities by denying the right of applicant, broker or dealer to make use of the mails and other instrumentalities of interstate commerce to effect transactions involving the purchase or sale of securities. In arriving at a final determination as to what action is required in the public interest in this case, I have noted the apparent sincerity of the applicant to do what is right and what may be required of him under our statutes hereafter. I have carefully observed the demeanor of the applicant and other witnesses who testified during these proceedings. I find much of the evidence susceptible to conflicting interpretations. While I have noted no deliberate attempt to mislead, nevertheless the memory of certain witnesses was hazy and at other times their testimony was downright confusing. In fact, direct statements made by certain witnesses at one time, especially the testimony given by Fox and others, were subsequently contradicted in part by themselves at a later time during the proceedings. In consequence, I have been obliged to carefully note the demeanor and forthrightness of all the witnesses at the time they were on the stand and my findings and conclusions have

⁶*Bond & Goodwin, Inc.*, Sec. Release No. 5343; *Van Alstyne, Noel & Co.*, 22 S. E. C. p. 180 (1946); *Ira Haupt & Co.*, 23 S. E. C. 606 (1946).

been arrived at on the basis of what I regard as reliable, probative and substantial record testimony. In doing so, I realize that the Commission is not limited by the strict rules as to the admissibility of evidence, which prevails in suits between private parties.⁷ I have not been unmindful that the more liberal practice of admitting testimony (and such was the case here), the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.⁸ Findings of fact are often inferential in nature resulting from a conclusion to be drawn from a multitude of related facts. On the one hand, it has been necessary to weigh certain conflicting statements against the statements of others and to consider the evidence as a whole in arriving at a final determination as to whether the public interest requires that the Respondent be denied his broker-dealer application for registration.

FINAL CONCLUSION.

I assume that since the hearing in this matter in November, 1954, Respondent has not engaged in the purchase and sale of securities as a broker and dealer. In consequence, his application for registration has been deferred accordingly and will continue to be deferred until the present denial proceedings have been resolved. The question arises as to whether applicant should be permitted to fully escape the consequences of his own wilful acts when he was acting as a broker-dealer without being registered. Even though applicant concedes that he acted as a broker-dealer when he should have been registered with the Commission, and since his acts in this respect must be

⁷*I. C. C. v. Baird*, 194 U. S. 25.

⁸*I. C. C. v. Louisville and Nashville Railroad*, 227 U. S. 93.

viewed either as the result of deliberate or reckless conduct, I would ordinarily be inclined to find that some adverse action would be warranted under the circumstances, such as a denial for a short period of time, say for instance, thirty days without prejudice to his filing a subsequent application for registration. I do not, however, make this recommendation, for it would appear that Respondent has not only learned the errors of his ways, but these proceedings have been lengthy and costly and furthermore, since his application for registration has been postponed for a considerable period of time as a result of these proceedings, I conclude that the public interest would not necessarily be served by the imposition of any additional penalty. In the light of the foregoing, I do not find that the public interest requires a denial of his application to register. I find, however, that the public interest will be served by permitting this application to become effective forthwith."

D.

The Commission's Order Does Not Give Proper Weight, as Required by Law, to the Recommended Decision of the Hearing Examiner.

The decision of the Supreme Court in the leading case of *N. L. R. B. v. Universal Camera Co.*, 340 U. S. 474 (1951), reversed a decision of the Board that (as here) was inconsistent with the findings of the man who heard the evidence. The court stated:

"The committee reports also made it clear that the sponsors of the legislation (the Administrative Procedure Act) thought the statute gave significance to the findings of the examiner."

340 U. S. 474, 496.

“* * * on matters where the Hearing Commissioner having heard the evidence and seen the witnesses is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.”

340 U. S. 474, 494.

This decision begins to face the facts of life so far as Administrative agencies are concerned. According to Professor Cooper of the University of Michigan Law School (consultant to one of the Hoover Commission Task Groups) it is the Securities and Exchange Commission's practice for the Commission *not* to read the record but to rely on a digest prepared by its staff. (41 A. B. A. Jour. 705, 707, Aug., 1955.) The learned professor comments that this practice:

“Often, decision depends on the weight to be accorded conflicting testimony. It seems entirely likely that a carelessly prepared digest (or, much worse, a digest prepared with the *hope* of sustaining a finding supporting the Commission's contentions) might lead to a different decision than would be obtained if the digest had been carefully and accurately prepared—or if decision were made by one who had heard the witnesses, or read their testimony in full.

This case, it is thought, illustrates the great difficulty that inheres where the members of the agency must rely on the judgment and judicial abilities of junior staff assistants to weigh the evidence.”

It thus appears, in S. E. C. practice, that the Recommended Decision may be a mere straw man. The real “weighing of the record,” according to the learned professor, apparently rests on the “judgment and judicial abilities of junior staff assistants.” But counsel for the

aggrieved party never get to see this private memorandum on which the Commission's decision rests. It will be noted that, in the case at bar, the Commission's Opinion stated:

"The hearing examiner recommended that the application for registration be permitted to become effective * * * Our findings are based upon an independent review of the record." [R. 250—4.]

Significantly, that was the final reference in the opinion to the Hearing Examiner.

Similarly, the Opinion did not mention the arguments in our brief. Pierce's counsel has never seen that "independent review" of the record. The Commission has not had the benefit of the comments of counsel for Pierce on the "independent review" on which Pierce's fate rests. This is the sort of procedure that Professor Cooper castigates. "The result is decision second hand, twice removed." (41 A. B. A. Jour. 705, 706.)

The Hearing Examiner, besides being a man of wide experience, acts publicly. Counsel are advised of his findings. Consequently it accords with American principles of justice that his findings, and not a private staff memorandum, should be the real basis of the decision.

We must never forget the principle that

"The one who decides must hear."

Morgan v. United States, 298 U. S. 468, 481 (1936).

It is recognized that it is difficult for agencies to be judicial in fact. Professor Schwartz, of New York University, writes:

"But the purpose of securing truly independent judicial determinations is subverted by the possession

by the agencies of executive functions. Agencies cannot be expected to decide cases before them with that 'cold neutrality of an impartial judge' of which Burke speaks when it is they who have instituted the proceedings against the private party, and they who have the burden of presenting the case against him."

69 Harv. L. Rev. 963 (1956).

It can be assumed that the Supreme Court was aware of these dangers to the judicial process when it ruled that the agency cannot ignore the findings of the Hearing Examiner. After all, he is the one man in the Administrative process who is in a position where he can act like a judge. A comparison of the Recommended Decision in this case with the Commission's Opinion shows, in his decision only, "the cold neutrality of an impartial judge."

In the present case the findings of the Hearing Examiner, favorable to Pierce, weren't even discussed in the Commission's Opinion denying registration. Apparently *no* weight was given to the Hearing Examiner's findings. This is contrary to law and to the decisions. The way for this Court to uphold the rule of law and the new importance of the Hearing Examiner, is to modify the Commission's Order so as to grant registration in accordance with the Hearing Examiner's recommendation.

E.

The Penalty Already Imposed on Pierce Is More Than Enough. Further Penalty Through Further Denial Is Unwarranted.

This point was covered thoroughly in the Hearing Examiner's Recommended Decision. Since then, however, Pierce has been denied registration for an additional year, which makes the argument for no further penalty all the more persuasive.

The purpose of registration, we must assume, is to protect the investing public. But here there is no showing that the public now needs protection from Pierce. Although exhibits filed in the case showed that Pierce had engaged in several hundred transactions since 1951, the Commission now claims only one of these to involve fraud. (The Hearing Examiner found no fraud.) In that case, Hayward's, occurring in early 1952, the customer consented that the funds, which were not paid over, be regarded as a loan. Hayward, an experienced business man, who knew the facts, regards Pierce as honest. Furthermore, as the Hearing Examiner found, Pierce took a responsible attitude towards his customers. The Hearing Examiner pointed out that Pierce made a refund, in one case, although not required to do so, and in another case offered to do so when a misunderstanding apparently had occurred. The proceedings in this case have obviously cost Pierce several thousands of dollars. They have also been a liberal education to him as to S. E. C. regulations. There appears no proper basis for any inference he would injure anyone in the future. Pierce desires to register and comply with the S. E. C. regulations. It appears to us that further penalties, after a year and a half of suspension, would be arbitrary, cruel and unusual and not in the public interest.

V.

CONCLUSION.

The Commission's Order dated August 16, 1955, should be modified to bring it into accord with the Recommended Decision of the Hearing Examiner who heard, and understood, the evidence. Petitioner's application for registration should be ordered to be permitted to become effective.

Respectfully submitted,

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No. 14901

**In the United States Court of Appeals
for the Ninth Circuit**

JOHN PIERCE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

**PETITION TO REVIEW AN ORDER OF THE SECURITIES AND
EXCHANGE COMMISSION**

BRIEF FOR RESPONDENT

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In the United States Court of Appeals for the Ninth Circuit

No. 14901

JOHN PIERCE, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

*PETITION TO REVIEW AN ORDER OF THE SECURITIES AND
EXCHANGE COMMISSION*

BRIEF FOR RESPONDENT

NATURE OF APPEAL

Petitioner, John Pierce, seeks to have this Court set aside an order of the Securities and Exchange Commission (the "Commission") denying him registration under Section 15 (b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U. S. C. § 78o (b),¹ and the right to do business (other than an exclusively intrastate business) as a broker and dealer in securities. The Commission found that

¹ The provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and the Commission's rules and regulations thereunder, involved herein are set forth in the Appendix, pp. 33-38, *infra*.

petitioner's course of conduct prior to his application for registration was such that it would be contrary to the public interest to permit him to engage in the securities business with members of the public, including permission to act as a broker handling the accounts of others. Petitioner now seeks from this Court the authorization which the Commission denied him.

JURISDICTION

The Commission's order was entered on August 16, 1955 (R. 250.10).² The petition for review was filed on October 14, 1955 (R. 247). Petitioner resides in Las Vegas, Nevada (R. 210). This Court has jurisdiction to review the Commission's order under Section 25 (a) of the 1934 Act, 15 U. S. C. § 78y (a).

COUNTERSTATEMENT OF THE CASE

Section 15 (a) of the 1934 Act, 15 U. S. C. § 78o (a), requires prior registration with the Commission of everyone who acts as a broker or dealer in securities (other than in an exclusively intrastate business or with respect to certain exempted securities not involved here) and who uses the mails or instrumentalities of interstate commerce in his transactions. Reg-

² "R." refers to the two volumes of the Transcript of Record, the first of which is printed. The second volume consists of the multilithed Recommended Decision of the Hearing Examiner and the Commission's Findings, Opinions and Orders. These multilithed documents are referred to by the transcript record page number of each document followed by a period and then the original number of the particular page involved. Thus, page 10 of the Commission's Findings, Opinion, and Order of August 16, 1955, contained in Volume II of the Transcript of Record, is referred to as R. 250.10.

istration is achieved through an application filed with the Commission pursuant to Section 15 (b) of that Act, 15 U. S. C. § 78o (b), which becomes effective after a short period of time unless the Commission, after notice and opportunity for hearing, orders that the application be denied for reasons set forth in that subsection. Section 15 (b) requires denial of registration, *inter alia*, if the Commission finds that the applicant has wilfully made false or misleading statements in his application with respect to any material fact or has been temporarily or permanently enjoined by any competent court from engaging in practices connected with the purchase or sale of any security, or has wilfully violated any provision of the Securities Act of 1933 or the Securities Exchange Act of 1934, or any rule or regulation thereunder, and finds that denial is in the public interest.

It is not disputed that for three years prior to the filing of the instant application petitioner engaged in business as a securities broker and dealer in violation of Section 15 (a) of the 1934 Act. Both the Hearing Examiner and the Commission found that these violations were wilful, and petitioner does not challenge those findings.

During that period petitioner was warned several times by Mr. Charles R. Burr, Assistant Regional Administrator in charge of the Commission's Los Angeles Branch Office, that he was violating the 1934 Act and was advised to file an application for registration if he desired to continue in business as a securities broker and dealer (R. 137-142). Petitioner, however, represented to Mr. Burr, and falsely so,

that he was trading for his own account only, and that he was not engaged in business as a broker or dealer (R. 139).

On May 7, 1954, petitioner finally filed an application for registration (CX 30, Tr. Doc. 64).³ Thereafter, in June of 1954, the Commission instituted proceedings to determine whether petitioner should be permitted to be registered. On the day before the scheduled hearing, August 3, 1954, petitioner withdrew his application (R. 221-2). It appears that even while this application was pending, and thereafter, petitioner continued to act as a securities broker-dealer in violation of the 1934 Act. (See CX 9, 22-27, Tr. Docs. 43, 56-61.)

On October 7, 1954, the Commission instituted an action in the United States District Court for the District of Nevada to enjoin petitioner from continuing to engage as a securities broker and dealer in violation of Section 15 of the 1934 Act. *S. E. C. v. Pierce*, D. Nev., Civil Action No. 70.⁴ Thereafter, on October 28, 1954, defendant filed the instant application for registration, and resisted the entry of any injunctive order on the ground, *inter alia*, that such injunction would be prejudicial to his applica-

³ The reference is to the Commission's Exhibit included in its Certificate of Transcript of Record, and to the transcript document number assigned thereto.

⁴ It appears also that previously, on August 18, 1953, the California Commissioner of Corporations had issued a "Desist and Refrain Order" against Pierce for engaging in business as a broker and dealer without being licensed to do so, in violation of the state Corporations Code. See Exhibit 1 to Burr affidavit of October 4, 1954, in the above action.

tion before the Commission. (Defendant's Answer, filed Nov. 12, 1954.) No injunction has been issued in that action; for on September 23, 1955, a stipulation was entered into, and approved by the court, to the effect that the Commission's motion for a preliminary injunction would be removed from the calendar with the understanding that the court would entertain and grant a motion for a permanent injunction during that time if Pierce engaged in any further violation of Section 15 of the Act. The stipulation provided also that after nine months the District Judge would entertain a motion to dismiss the action if said motion were supported by Pierce's affidavit that he had not engaged in any violations of Section 15 during that period. The nine months' period recently expired. At this writing no motion has been filed.⁵

As previously noted, the instant application was filed shortly after the institution of the Commission's action for an injunction (R. 7, 9). On November 5, 1954, the Commission instituted proceedings pursuant to Section 15 (b) of the 1934 Act to determine whether the application should be permitted to become effective or should be denied (R. 9). In addition to the aforementioned violations of the registration requirements of Section 15 (a) of the 1934 Act, the Order for Proceedings referred to information reported by the Commission's staff to the effect that

⁵ These facts of official record have relevance, *inter alia*, to petitioner's assertion that he was "unmolested" until, acting on the advice of counsel, he decided to "regularize" his activities and register, and that, having done the right thing, he has now had "the book thrown at him" (R. 36).

Pierce had been fraudulent and deceitful in his transactions with and on behalf of customers in violation of Section 17 (a) of the Securities Act of 1933 (the "1933 Act"), 15 U. S. C. § 77q (a), Section 10 (b) of the 1934 Act and Rule X-10B-5 thereunder, 15 U. S. C. § 78j (b), 17 C. F. R. § 240.10b-5, and Section 15 (c) (1) of the 1934 Act and Rule X-15C1-2 thereunder, 15 U. S. C. § 78o (c) (1), 17 C. F. R. § 240.15c1-2, and that the financial statement contained in his application for registration was false and misleading in violation of Section 15 (b) of the 1934 Act and Rule X-15B-8 thereunder, 15 U. S. C. § 78o (b), 17 C. F. R. § 240.15b-8 (R. 9-21).

Hearings were held before Edward C. Johnson, the Hearing Examiner designated in the Commission's Order, in Los Angeles, California, in November and December of 1954. On November 26, 1954, Pierce consented to postponement of the effectiveness of registration pending final determination of the question of denial. By order dated November 29, 1954, the Commission accepted his consent (R. 249.2, 249.4).

On February 8, 1955, the Hearing Examiner filed his Recommended Decision (R. 249). He found, and noted that Pierce himself had conceded, that from August of 1951 until October of 1954 Pierce had done business as a securities broker and dealer without registration in wilful violation of the 1934 Act. He found, however, no violations of the anti-fraud provisions of Section 17 (a) of the 1933 Act, and Sections 10 (b) and 15 (c) (1) of the 1934 Act, and Rules X-10B-5 and X-15C1-2 thereunder (R. 249.11-249.32). The financial statement, in his opinion, was

inaccurate in understating Pierce's unsecured liabilities; but he did not believe that there was sufficient evidence of a wilful violation of Section 15 (b) and Rule X-15B-8 (R. 249.32-249.39). He concluded that the public interest did not require denial of registration, observing that Pierce had been "forthright" in his testimony, had "learned the errors of his ways," had suffered enough from the cost and duration of the proceedings and the postponement of registration, and that in the circumstances no "additional penalty" was warranted (R. 249.16, 249.42-249.44).

The Commission's Division of Trading and Exchanges filed extensive exceptions to the Hearing Examiner's Recommended Decision (Tr. Docs. 24, 25). In response, Pierce's counsel declined to answer particular exceptions and arguments of the staff, requested adoption of the Recommended Decision, and objected to any review of the findings of the Hearing Examiner (Tr. Doc. 27). Moreover, his counsel did not seek oral argument before the Commission (R. 251.3).

The Commission made an independent review of the record, and on August 16, 1955, issued its Findings, Opinion and Order denying Pierce's application for registration (R. 250). The Commission found that Pierce not only had wilfully violated Section 15(a) of the 1934 Act in doing business as a broker and dealer in hundreds of transactions during a period of several years immediately preceding his application without being registered, but had also wilfully violated the previously mentioned anti-fraud

provisions of the 1933 and 1934 Acts in his dealings with a customer. It found further that his omission to disclose substantial liabilities in the financial statement in his application was also wilful and rendered that statement materially false and misleading. The Commission concluded that the public interest required denial of the application.

Thereafter, Pierce sought and obtained an extension of time beyond the normal five day period in which to file a petition for rehearing⁶ (Tr. Docs. 29-31). That petition was not filed until September 26, 1955 (R. 22-37).

On October 14, 1955, while the petition for rehearing was still pending before the Commission, Pierce filed the instant petition for review of the Commission's order of August 16, 1955. Thereafter, on October 24, 1955, the Commission filed its Memorandum Opinion and Order denying the petition for rehearing (R. 251).

ARGUMENT

Preliminary Statement

The proceedings before the Commission involved petitioner's fitness to do business as a broker and dealer in securities on behalf of and with members of the investing public. The nature of the securities business is such that, as a practical matter, the average customer must and generally does place great

⁶ Rule XII (e) of the Commission's Rules of Practice, 17 C. F. R. § 201.12 (e).

reliance upon the honesty and integrity of the broker-dealer with whom he does business. Securities are not ordinary commodities—such as food or clothing—whose value the average customer may be in a position to appraise fairly accurately. Rather, in the words of Congress, securities are in a very real sense “intricate merchandise.”⁷ The business of trading in them “is one in which opportunities for dishonesty are of constant recurrence and ever present.”⁸ The business was “considered one peculiarly in need of regulation for the protection of the investor.”⁹ The state “blue sky laws” having been regarded as inadequate, federal regulation was provided.¹⁰

This case involves an important aspect of the federal regulation—namely, the registration or licensing of persons who desire to engage in the securities business (other than in an exclusively intrastate business) and who use the mails or instrumentalities of interstate commerce in their transactions. (Section 15 (a) of the 1934 Act.) Responsibility is placed upon the Commission to see to it that persons who have been guilty of specified derelictions reflecting adversely upon their integrity and fitness to engage in the securities business are not authorized to do so where such would

⁷ H. R. Rep. No. 85, 73d Cong., 1st Sess. (1933), p. 8.

⁸ *Archer v. SEC*, 133 F. 2d 795, 803 (C. A. 8, 1943), *cert. denied*, 319 U. S. 767 (1943).

⁹ *Charles Hughes & Co., Inc. v. SEC*, 139 F. 2d 434, 437 (C. A. 2, 1943), *cert. denied*, 321 U. S. 786 (1944).

¹⁰ *Ibid.*

be contrary to the public interest. (See Section 15 (b).) Among the specified grounds for denial are prior wilful violations of the broker-dealer registration or the anti-fraud provisions of the federal securities statutes, or the making of wilfully false and misleading statements of material facts in the application for registration—all of which the Commission found petitioner to have been guilty. As previously indicated, the Commission concluded that denial of registration was in the public interest.

As an unsuccessful applicant petitioner is entitled to judicial review of the Commission's determination under Section 25 (a) of the 1934 Act, 15 U. S. C. § 78y (a). The statute provides, however, that in such review proceedings "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Ibid.* This serves to emphasize the primary authority and responsibility of the Commission with respect to the registration of persons who seek to do business as securities brokers and dealers, and the more limited authority of the reviewing court to disturb the administrative determination only if the factual findings are not supported by substantial evidence or if the Commission has departed from the law.

Petitioner misconceives the purpose of the statute and the nature of the Commission's responsibility thereunder when he attacks the denial order as an excessive "penalty" for his past derelictions (R. 37, 256; Pet. Br. 37). Whatever the disadvantage to petitioner, the statutory objective is not to inflict punishment on an applicant for past misdeeds

but rather to protect the investing public by excluding undesirable persons from the securities business. See *Wright v. SEC*, 112 F. 2d 89, 94 (C. A. 2, 1940).

Petitioner seems to assume also that he has something in the nature of a vested interest in continuing to engage in the securities business in which he admittedly was illegally engaged at the time the Commission sought an injunction. This, of course, is not so. Petitioner has no lawful securities business which is now at stake, but is seeking a license to engage lawfully in that business for the first time. If the public interest requires denial, as the Commission found, petitioner is not deprived of any legal right by the unavailability of a contemplated source of income.

We turn now to the Commission's findings and to the evidence which supports them.

I. For several years prior to the instant application petitioner did business as a securities broker and dealer without registration in wilful violation of Section 15 (a) of the Securities Exchange Act of 1934.

The Commission found, and petitioner here admits (R. 248; Pet. Br. 3), that for several years prior to the instant application petitioner engaged in business as a securities broker and dealer without registration in wilful violation of the statute.

According to the Commission's findings (R. 250.4) in 1951 and 1952 petitioner effected transactions in Las Vegas, Nevada, and in various places in California with various members of the public involving the purchase and sale of stock of the Las Vegas Thoroughbred Racing Association, a corporation formed to construct and operate a horse racing track.

at Las Vegas. Prior thereto he had acted as a salesman for the underwriter of the initial offering of the stock of that association. In 1952 the racing association was reorganized under Chapter X of the Bankruptcy Act. Petitioner then sought—through advertisements placed in newspapers in Los Angeles and Las Vegas—to sell to the public stock of the successor corporation, the Las Vegas Jockey Club.

In 1953 and 1954 petitioner was engaged in selling stock in Golden Nugget, Inc., a corporation operating a casino and restaurant in Las Vegas. He placed advertisements offering the stock for sale in several newspapers, including newspapers in Denver, Salt Lake City, and Las Vegas. He replied by mail to inquiries which resulted from the advertisements. He made arrangements with various banks for handling the transactions, and sold stock to over fifty persons residing in several states.

Petitioner was also engaged during this period in selling stock of Show Boat Hotel, Inc., and Terry Drilling Company, and used the mails and facilities of interstate commerce in offering these securities to the public.

Petitioner does not challenge the Commission's finding that these violations were wilful. The Commission noted, in this connection, that following the close of the offering of stock of the racing association in 1951, petitioner discussed the matter of trading in that stock with Burr, the Commission's Assistant Regional Administrator in charge of its Los Angeles branch office, who advised him to apply for registration as a broker-dealer. Subsequently, in May of

1952, after receiving information that petitioner had been effecting transactions Burr again warned him that he should seek registration and sent him the necessary application forms. Thereafter, on two subsequent occasions Burr again warned petitioner that he was violating the law and should apply for registration. The Commission also took cognizance of the fact that petitioner continued to do business in violation of Section 15 (a) during the period that his first application for registration was pending and after it was withdrawn. As previously indicated, the instant application was filed only after the Commission instituted court action to enjoin petitioner from further violations of the statute.

In a portion of the Hearing Examiner's Recommended Decision which petitioner adopts in his brief (R. 249.39; Pet. Br. 29) petitioner is described as having "displayed a somewhat callous disregard of the consequences of his acts." The Hearing Examiner had no difficulty in concluding, as did the Commission, that the aforementioned violations were clearly wilful.

Since petitioner does not challenge these findings, we shall not labor the point. It should be borne in mind, however, that these continued and deliberate violations were an important factor in the determination below and would in themselves have justified a finding that denial of the application was in the public interest. *Cf. In re Alexander Smith*, 22 S. E. C. 13, 19-20 (1946).

II. Petitioner wilfully violated the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 in his dealings with a customer.

The Commission also found (R. 250.5-250.7) that petitioner wilfully violated the anti-fraud provisions of Section 17 (a) of the 1933 Act, Section 10 (b) of the 1934 Act and Rule X-10B-5 thereunder, and Section 15 (c) (1) of the 1934 Act and Rule X-15C1-2 thereunder, in his dealings with a "Mr. H" whose stock he undertook to sell. "Mr. H" is one Earl B. Hayward, of Santa Barbara, California (R. 63).

According to the Commission's findings, in 1951 Hayward purchased from petitioner 3,000 units (consisting of 3,000 shares of preferred stock and 3,000 shares of common stock) of the stock of the Las Vegas Thoroughbred Racing Association during the public offering of those securities when petitioner was a salesman for the underwriter. Hayward paid \$5.00 a unit, or a total of \$15,000. Subsequently Hayward became dissatisfied with the progress of the construction of the race track and asked petitioner to try to dispose of some of his stock for him, stating that he wanted to get his money back. Petitioner advised him that he could not sell the stock for as much as \$5.00 a unit, but thought he could get \$3 or \$4 a unit. Hayward eventually agreed to the sale of 200 units at \$3 a unit, and 800 units at \$4 a unit. Some time prior to February 21, 1952, he sent petitioner his certificates for 1,000 units to be sold (R. 250.5).

The Commission found, however, that prior to this arrangement with Hayward, petitioner had been advised by a "Mr. F," one William E. Fox, of South

Gate, California (R. 143), that Fox and some associates desired to invest \$12,000 to \$15,000 in stock of the racing association. Petitioner, in turn, had advised Fox that the current market price was \$6.00 a unit and that he thought he could obtain some units for Fox at that price. When petitioner received Hayward's certificates for 1,000 units, he sold 500 of them to Fox at \$6.00 per unit, and had the balance transferred to himself. He wrote Fox explaining that the delay in sending him the units was occasioned by extreme difficulty in obtaining the stock, but that he would try to obtain more if Fox advised him promptly. On February 29, 1952, Fox sent petitioner his check for \$3,000 in payment for the 500 units. Thereafter, on March 3, 1952, petitioner sent Hayward a check for \$600 which he stated covered the sale of 200 units at \$3 a unit. He said that he still held 800 units which he hoped to be able to dispose of shortly at \$4.00 per unit (R. 250.6-250.7).

In March of 1952 petitioner sold the remaining 500 units of Hayward's stock to Fox and his associates at \$6.00 per unit and received payment therefor; but he did not report any further sales to Hayward until May 14, 1952. He then wrote Hayward that he had sold only 200 additional units at \$4.00 per unit for which he enclosed a check for \$800 and that he hoped to dispose of the balance of 600 units shortly. The check was dishonored for insufficient funds, and Hayward waited another four months, until September of 1952, before petitioner paid him the \$800. Hayward waited nearly two years more before receiving any

further payments from petitioner. In June of 1954, petitioner paid him \$200 and gave him a note for \$2,200 for the remaining 600 units (R. 250.6).

The Commission found that Hayward had no independent knowledge and relied entirely on petitioner's representations as to the market value of the stock. It was not contemplated that petitioner would purchase Hayward's stock with his own funds, but rather that he would act for Hayward in selling the stock at what he represented was the best price then obtainable. His representation that he could not obtain \$5.00 per unit, but only \$3.00 and \$4.00, was fraudulent since he knew at that time that Fox and his associates were willing to pay \$6.00 per unit. He further violated the statutory anti-fraud provisions in his gross misrepresentations and false accounting to Hayward as respects the disposition of the stock. All of this, the Commission concluded, clearly operated as a fraud and deceit upon Hayward (R. 250.6-250.7).

Petitioner challenges these findings, claiming that he bought Hayward's stock for his own account, that Hayward was satisfied with the \$3.00 and \$4.00 prices and had no interest whatsoever in what petitioner might obtain for the stock on resale, and that his failure to pay Hayward promptly was due to financial difficulties which he subsequently encountered and involved no fraud or deceit upon Hayward. Petitioner's version was accepted by the Hearing Examiner. As indicated above, however, the Commission found that the evidence negated petitioner's explanation. Under Section 25 (a) of the Act, the Commission's

findings are governing if supported by "substantial evidence."

The evidence as a whole leaves little room for doubt that petitioner undertook to sell Hayward's stock for him at what he falsely represented was the best price he could then obtain. Hayward testified that he "asked [petitioner] if he wouldn't take and sell some of my stock, get my money back" (R. 68). He said he wanted to get at least \$5.00 per unit, the price he had paid (R. 99, 100, 101, 106, 115, 122), but was advised by petitioner that the \$5.00 price was not obtainable but that he could probably get \$3.00 or \$4.00 per unit (R. 115, 117, 118, 119, 121, 122, 124). While Hayward prided himself on his knowledge of the construction business and his ability to evaluate the extent of the progress being made in constructing the race track (R. 107-108, 111-112), he testified, "I don't know what the market value of the stock was * * * I don't know anything about stocks" (R. 103-104; see also R. 119). He said that he made no independent inquiry as to the market value of the stock (R. 122), but relied entirely on the petitioner, and that he had "no reason to doubt his integrity up to that point" (R. 119). When petitioner advised him that \$5.00 could not be obtained (R. 115, 118, 124) and told him that \$3.00 and \$4.00 was the best he could get, he said he replied, "If that's all you can get, let's sell it" (R. 117). In light of petitioner's advice, he considered himself "fortunate in being able to recover \$3 and \$4" for the stock (R. 102-103). He was unequivocal in his testimony that petitioner was to sell the stock for him, and was not

buying it from him (R. 95, 119). While he stated that thereafter he did not feel that it was any of his concern what petitioner actually got for the stock, he explained that he felt that he had committed himself to accepting \$3.00 and \$4.00, and "my word is my bond" (R. 125). He observed that he did not expect petitioner to be able to sell the units, "but he did sell them, and that was our agreement, and that is what I expected" (*Ibid.*).

Inconsistent with Hayward's testimony is that of the petitioner who stated, "I told him that I would buy the stock from him at the rate of \$3 a share, a unit, for 200 units, and \$4 a unit for the balance of the 800 units" (R. 211-212). Petitioner's self-serving statement at the hearing, however, is in direct conflict with his own letters to Hayward at the time of the events in question which were introduced into evidence. Thus, in his letter of March 3, 1952, in which he misrepresented that he had only disposed of 200 units at \$3.00 apiece, he stated: "I hope to be able to unload the balance for you shortly" (R. 38). In his letter of May 14, 1952, in which he falsely represented that he had disposed of another 200 units at \$4.00 apiece, he stated: "I've sold 200 units of your stock * * * I hope to be able to move the balance of your stock very shortly * * * I hope you understand and appreciate what I'm trying to do for you. I sincerely would like to get you out from under as quickly and for as much as I can" (R. 39). This aspect of the evidence, unfortunately, is not considered in the recommended decision of the Hearing Examiner who apparently reached his conclusion

that petitioner had acted as a principal-dealer on the basis of petitioner's testimony which he regarded as "forthright and unambiguous" (R. 249.16) as opposed to that of Hayward which he characterized as "contradictory * * * confusing and indecisive" (R. 249.23). As previously indicated, however, the contemporaneous correspondence, which is of greater probative value, is consistent with Hayward's testimony and wholly inconsistent with that of the petitioner. It appears also that in October of 1952 petitioner admitted to Burr, the Commission's Assistant Regional Administrator, that in his dealings with Hayward he had acted in an agency capacity (R. 139).

The recommended decision of the Hearing Examiner, which petitioner now adopts as his argument (Pet. Br. 6-18), assumes also, and erroneously, that the statutory anti-fraud provisions would not be violated in this case unless petitioner "actively mislead Hayward and acted other than as a principal or dealer" (R. 249.23). The anti-fraud provisions, of course, were violated if petitioner made false and misleading statements of material facts to Hayward in the transactions in question whether he acted as a principal or as an agent; and the record is replete with evidence of such misrepresentation and deceit on petitioner's part.

Thus, as previously shown, in February of 1952, when petitioner undertook to sell Hayward's stock for him, he replied that he could get no more than \$3.00 and \$4.00 per unit. The record is barren of any indication that petitioner, through negotiations with potential buyers or otherwise, had any basis for

representing that \$3.00 and \$4.00 were the best prices obtainable at that time. On the contrary, the record shows that he then had purchasers who were ready, willing and able to pay \$6.00 a unit and who subsequently bought all of Hayward's stock at that price. William E. Fox, who with some associates had purchased a sizeable block of the stock from petitioner in November of 1951, testified that he and his wife decided to invest \$12,000 to \$15,000 in stock of the racing association and had left that thought with petitioner (R. 154). In February of 1952 Fox had a long-distance telephone conversation with petitioner concerning further acquisitions in which he indicated that he and his associates were interested in buying more stock at what he assumed to be the current market of \$6.00 per unit (R. 158-159). After receipt of Hayward's stock petitioner delivered 500 units to Fox and his associates at \$6.00 per unit and then held Fox up another month before he let him and his associates have the remaining 500 units at the \$6.00 price (R. 41, 162, 163, 192, 193.)¹¹ In transmitting the first 500 units to Fox under a covering letter of February 21, 1952, he stated: "I regret the delay, but it has been extremely difficult to acquire the stock * * * I feel that the next few weeks until things are settled will be the only time that I may be able to pick up any further units" (R. 45-46).

¹¹ There is some suggestion in the record that, unknown to Hayward, petitioner may actually have sold Hayward's stock to Fox and his associates at the \$6.00 price even before Hayward finally agreed to take \$3.00 and \$4.00 as the best prices obtainable. See R. 41, 117, 122-123.

Nearly two weeks later, on March 3, 1952, when petitioner made a partial remittance to Hayward, he falsely represented in his covering letter that he had only been able to sell 200 units at \$3.00 a unit (R. 38).

By March 28, 1952, petitioner had sold all of Hayward's 1,000 units and had received a total of \$6,000 (R. 136-137, 249.21). Yet, he made no further report to Hayward until the middle of May when he sent him a check in the amount of \$800 for 200 additional units. He falsely represented in his covering letter of May 14, 1952, that he had sold these units at \$4.00 apiece, and that he still had 600 units of Hayward's stock which he expected to sell shortly. He further stated in that letter: "The race track is now under Bankruptcy Act number 10 and its a bit difficult finding anyone crazy enough to purchase the stock; however, Barnum said, 'There's a new one born every day' " (R. 39).

It appears that the Chapter X petition was filed in January of 1952 (R. 61), and that notwithstanding the pendency of that proceeding Fox and his associates were willing to pay \$6.00 per unit which, Fox was satisfied, represented the "going price" (R. 158), that they bought 1,400 units from petitioner at that price in February and March of 1952, including all of Hayward's stock (R. 41, 45, 159, 165-166), and that thereafter, in July and October of 1952, Fox bought additional shares from petitioner at the \$6.00 price (R. 167, 168).

The \$800 check petitioner sent Hayward in May of 1952 was dishonored, and petitioner did not make it good until September of that year. Thereafter, he

made no payment on the \$2,400 balance for nearly two years and made a small partial payment then only after Hayward turned the matter over to a lawyer (R. 87-90), at which time he gave him \$200 in cash and a note for the balance (R. 80).

Thus, not only did petitioner misrepresent to Hayward the best price he could obtain for the stock, but continued to misrepresent the amounts which he had sold for him and the prices he had obtained therefor, and was grossly deceitful in his accounting. While the record clearly establishes that petitioner undertook to sell the stock on Hayward's behalf, his misrepresentations and deceit in the transactions in question would have violated the statutory anti-fraud provisions even had he acted as a principal. As previously indicated, this aspect of the case was not dealt with by the Hearing Examiner who apparently assumed, and erroneously so, that the determination of fraud and deceit necessarily turned on proof of a principal and agent relationship.

III. Petitioner's financial statement in his application for registration was wilfully false and misleading in contravention of Section 15 (b) of the Securities Exchange Act of 1934 and Rule X-15B-8 thereunder.

The Commission found also that in contravention of Rule X-15B-8 petitioner had wilfully understated his liabilities in the sworn financial statement which he submitted in his application for registration (R. 250.8-250.9). That rule, promulgated under Section 15 (b), provides that every applicant for registration shall file with his application a statement of financial condition in such detail as will disclose the

nature and amount of his assets and liabilities and his net worth. The rule requires an oath or affirmation that the statement is true and correct.

Petitioner filed and swore to the accuracy of the following statement as of October 26, 1954 (R. 8):

Assets:

Cash-----	\$3,000.00
House and furniture, 1021 Bracken, Las Vegas-----	20,000.00
Cadillac automobile-----	5,500.00
Jewelry and miscellaneous-----	3,500.00
Showboat Hotel, Inc., stock-----	2,100.00
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Total assets-----	34,100.00
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Liabilities:

Mortgage on house-----	9,000.00
Mortgage on car-----	1,500.00
Miscellaneous-----	500.00
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Total liabilities-----	11,000.00
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Net worth-----	23,100.00

Petitioner admits that he failed to disclose additional unsecured liabilities in excess of \$3,000, including his debt to Hayward (R. 215). He claims the omission was inadvertent. The Commission rejected his proffered explanation and concluded that the omission was wilful (R. 250.9). The Commission referred to the evidence that petitioner had discussed his financial affairs with its Los Angeles branch office before filing the statement, and that he had told Burr, the Commission's representative, that he had settled his account with Hayward and had paid him in full, whereas in fact he owed Hayward \$1,900 on the note (R. 250.9, 251.3). Moreover, the Commission considered it "incredible" that the statement of miscellaneous unsecured liabilities at \$500 instead of over \$3,500 by one who was a sole proprietor without any organ-

ized business could have been a mere “oversight” (R. 251.2). In the Commission’s view, the liabilities omitted were substantial and rendered the statement materially false and misleading (R. 250.9).

The Hearing Examiner, whose recommended decision petitioner has adopted as his own argument (Pet. Br. 22–29), agreed that the financial statement was “inadequate” and in need of amendment (R. 249.38). He concluded, however, that there was “insufficient evidence to justify a finding of willfulness” (*Ibid.*). As previously noted, the Commission disagreed.

The Hearing Examiner appears to have been influenced by petitioner’s testimony that he had also forgotten to list a leasehold interest which he valued at \$10,000 (R. 215, 249.34, 249.35).¹² The lease was one for five years under the Federal Small Tract Act covering five acres near Las Vegas (R. 50). Petitioner testified, and his attorney Dotson stated, that it could be converted into a fee interest at relatively small expense (R. 224–225). Although it could not lawfully be assigned without the approval of the Government, in August of 1953 petitioner sent the lease to Fox as “collateral” for a \$1,000 debt (R. 56). The Hearing Examiner found the underlying tract to be worth \$7,500 (R. 249.36), and valued the leasehold interest at \$5,000 (R. 249.38), an amount greater than the unreported liabilities, which would mean that petitioner’s net worth was actually greater than he had

¹² Only a year earlier petitioner had claimed that the property was worth \$5,000 (R. 47).

reported.¹³ While he did not expressly say so, his finding of "insufficient evidence" of willfulness appears to have been affected by his valuation of the omitted putative asset.

The Commission stated, however, and correctly so, that "The fact that applicant had an unreported putative asset in the form of an interest in real property which may have had a value in excess of the unreported liabilities is irrelevant. The applicable rule calls for disclosure of all liabilities. Insofar as the Hearing Examiner's report may imply that the omission of liabilities may be condoned if there are unreported assets of an equal or greater amount so that the actual net worth of an applicant is greater than that set forth in his sworn statement, the suggestion is specifically disapproved" (R. 251.3).

The record, we believe, amply supports the Commission's finding that the gross understatement of petitioner's unsecured liabilities was wilful. Petitioner was very much aware of these liabilities which were major ones to him, as his correspondence with his customers and their lawyers clearly reveals (R. 46-50, 56-59). As indicated in the Commission's opinion, Burr, the Commission's Assistant Regional Adminis-

¹³ In reaching his valuation the Hearing Examiner relied upon petitioner's self-serving testimony, the unsworn statement of petitioner's attorney Dotson, and private conversations with one McCoig, a Las Vegas real estate broker who accompanied the Hearing Examiner on a post-hearing inspection of the tract (R. 249.35-249.36). Apart from the irrelevancy of the valuation in the determination under Rule X-15B-8, Dotson's and McCoig's unsworn statements were clearly without evidentiary value.

trator, had questioned him about his debt to Hayward in connection with his first application for registration (which did not reveal these liabilities), and he had falsely represented that he had settled that obligation and had paid Hayward in full (R. 142). At the time of the instant filing, petitioner was still making installment payments on some of these debts and in fact made a \$200 payment to Hayward on the day Hayward testified (R. 109). Considering all of the evidence, the Commission properly rejected as incredible petitioner's contention that his omission to disclose the aforementioned liabilities was not deliberate but a mere oversight.

IV. The Commission properly found that denial of registration was in the public interest.

The record establishes, and the Commission found, that for several years prior to the instant application petitioner had unlawfully done business as a securities broker-dealer in disregard of repeated admonitions by the Commission's staff, that he was guilty of fraudulent misrepresentations and deceit in his dealing with a customer in wilful violation of the statutory anti-fraud provisions, and that the financial statement which he submitted in the instant application was wilfully false and misleading in material respects (R. 250.9). The record shows also that he made false statements to Burr, the Commission's representative, regarding the nature of his activities (R. 139) and his liabilities to Hayward (R. 142). Indicative also of petitioner's disregard of the law was his continued activities as a broker-dealer in deliberate violation of the statute during the period his first

application was pending and after its withdrawal, and the fact that the instant application was filed only after the Commission instituted a court action for an injunction. See pp. 4-5, *supra*. Relevant also is petitioner's lack of an adequate sense of financial responsibility to his customers as is shown by his failure to make timely and proper remittances of the proceeds of the sale of Hayward's stock (see pp. 15-16, 20-22, *supra*), and by the instances in which he gave his customers bad checks (R. 72, 75, 92, 180).¹⁴ In ascertaining the "public interest," it is the character of the particular statutory violations and other improprieties found, rather than the financial consequences, which is of prime importance. Cf. *In re Burley & Co.*, 23 S. E. C. 461, 468-9 (1946); *In re General Securities Corp.*, 18 S. E. C. 635, 637 (1945). We think it clear that the Commission properly concluded that denial of registration in this case was in the public interest (R. 250.9).

The Hearing Examiner's contrary recommendation that the public interest did not require denial of registration appears to have been based in part on the mistaken notion that petitioner's derelictions were confined merely to his prior failure to seek regis-

¹⁴ Of interest also, in this connection, are indications in the record that while petitioner was requiring customers to accept small installment payments on monies due them on a claim of inability to meet his obligations he was accumulating substantial possessions of his own—including cash, real estate, and securities—and maintaining a Cadillac automobile which he valued at \$5,500 and on which he appears to have made payments of \$1,500 between November 10, 1953, and October 26, 1954 (R. 8, 46-48, 49-50, 56-58, 71, 84, 87, 89, 91-93, 109, 168-170, 173-179, 184-185, 194-197).

tration, which petitioner corrected, in part on his feeling that petitioner had been forthright in his testimony and that he sincerely desired to comply with the law, and in part on his erroneous concept of denial as a personal "penalty" (R. 249.40-249.42). As we have shown, however, petitioner's illegal conduct was of much greater scope and of a character which clearly demonstrated his unfitness to engage in the securities business with the public and to handle other people's accounts. As previously indicated, petitioner's testimony, which the Hearing Examiner regarded as "forthright," conflicted with his own letters written at the time of the events in question—writings upon which the Commission properly relied in ascertaining the facts. Petitioner's statements at the hearing of his earnest desire to comply with the law, it would also appear, are completely overshadowed by the illegal activities in which he deliberately engaged over a period of years and the fact that the instant application was filed only after the Commission went to court. As for the suggestion that petitioner has been punished enough by the cost and duration of these proceedings, and that no "additional penalty" is warranted, we have already pointed out that the purpose of denial of registration is not penal but to protect the investing public by excluding undesirable persons from the securities business.

To our knowledge the record contains nothing which would justify a conclusion contrary to that reached by the Commission.

V. The propriety of the denial order is unaffected by the Commission's disagreement with the findings of the hearing examiner.

Under the statute, it is the Commission which must decide whether an applicant shall be permitted to be registered as a broker-dealer, and which must make the findings necessary to that determination. Section 15 (b) of the 1934 Act. The Act further provides that, upon judicial review of the Commission's order, the Commission's findings of fact shall be conclusive if supported by "substantial evidence." Section 25 (a). Substantial evidence, of course, is more than a "mere scintilla." It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 229 (1938). "* * * it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300 (1939). See also *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951). We believe that we have shown that the Commission's findings are clearly supported by such evidence and, moreover, that the record does not justify contrary findings.

Under the Commission's Rules of Practice, Rule IX (d), 17 C. F. R. § 201.9 (d), the recommended decision of a hearing examiner is advisory only and does not bind the Commission. The rule requires that the initial page of every recommended decision shall so state; and, in accordance with that requirement, the recommended decision in this case so stated

(R. 249.1). The Supreme Court has emphasized that the Administrative Procedure Act has not modified in any way the "substantial evidence" rule when an agency and its hearing examiner disagree, *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), and has expressly rejected the notion that the "clearly erroneous" rule has any applicability to the findings of a hearing examiner, *FCC v. Allentown Broadcasting Corp.*, 349 U. S. 358 (1955). See also *NLRB v. Pacific Intermountain Express Co.*, 228 F. 2d 270 (C. A. 8, 1955).

Petitioner's suggestion that the Commission ignored the Hearing Examiner's report is an unwarranted reflection upon the good faith of the Commission when it stated in its opinion on denial of rehearing that—"The fact that our Findings and Opinion did not include a detailed discussion of the recommended findings of the Hearing Examiner should not be construed as an indication that they were not given due attention" (R. 251.2). Petitioner likewise does not, and cannot, proffer any substantiation for his further suggestion that the Commission itself never read the record. Here again the Commission expressly stated in its Findings and Opinion that it had independently reviewed the record (R. 250.4). Moreover, on the petition for rehearing, the Commission took occasion to characterize as completely "unfounded" petitioner's charge that it had no familiarity with the record (R. 251.2).

Nor is there anything to support petitioner's innuendo that the Commission relied upon a digest of

the record prepared by its staff, and that the ultimate decision in this case was made by "junior staff assistants" (Pet. Br. 34-35). Whether or not the Commission had the benefit of a digest of the record prepared by its Opinion Writing Office is, of course, "part of [the] internal decisional process which may not be probed on appeal." *Norris & Hirschberg, Inc. v. SEC*, 163 F. 2d 689, 693 (C. A. D. C. 1947). Even had the Commission utilized the services of its subordinates in this fashion there would have been no impropriety. *Ibid.* Petitioner's quotation from *Morgan v. U. S.*, 298 U. S. 468, 481 (1936)—"the one who decides must hear"—is not complete. Immediately thereafter the Supreme Court also stated: "This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department * * * Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. * * *."

Petitioner's assertion that "The Commission has not had the benefit of the comments of counsel for Pierce on the 'independent review' on which Pierce's fate rests" (Pet. Br. 35) is singularly lacking in grace. Petitioner's counsel filed a brief in opposition to the exceptions taken by the Division of Trading and Exchanges to the Hearing Examiner's recommended decision (Tr. Doc. 27). In that brief his counsel declined even to discuss the staff's exceptions and arguments, but instead made a broad demand for blanket adoption of the Hearing Examiner's recommended decision without any review whatsoever. Petitioner's counsel did not seek to present oral argument to the Commission whose function they con-

ceived to be simply that of giving effect to the recommendation of the Hearing Examiner favorable to their client. It was only after the Commission handed down its adverse findings and opinion that they sought in a petition for rehearing to present any argument on the merits of the case (R. 22). As previously noted, they requested and obtained from the Commission approximately six weeks instead of the usual five days in which to file that petition. Thereafter, their arguments were fully considered by the Commission and properly found to be wholly lacking in merit (R. 251.3).

CONCLUSION

The Commission properly exercised its statutory function and responsibility in denying petitioner authorization to do business as a securities broker and dealer with members of the investing public. Its findings are fully supported by the record. No showing has been made why this Court should disturb the Commission's determination. The denial order of August 16, 1955, should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTES AND RULES INVOLVED

Section 15 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78o (a), provides:

No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

Section 15 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78o (b), provides in relevant part:

A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

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The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration pursuant to this subsection or in any document supplemental thereto or in any proceeding before the Commission with respect to registration pursuant to this subsection any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact; or (B) has been convicted within ten years preceding the filing of any such application or at any time thereafter of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securities Act of 1933, as amended, or of this title, or of any rule or regulation thereunder. * * *

Section 17 (a) of the Securities Act of 1933, 15 U. S. C. § 77q (a) provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or com-

munication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule X-10B-5 promulgated under Section 10 (b) of the Securities Exchange Act of 1934, 17 C. F. R. § 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 15 (c) (1) of the Securities Exchange Act of 1934, 15 U. S. C. § 78o (c) (1), provides:

No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive, or otherwise fraudulent.

Rule X-15C1-2 promulgated under Section 15 (c) (1) of the Securities Exchange Act of 1934, 17 C. F. R. § 240.15c1-2, provides in relevant part:

(a) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in section 15 (c) (1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in section 15 (c) (1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the

statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

Rule X-15B-8 promulgated under Section 15 (b) of the Securities Exchange Act of 1934, 17 C. F. R. § 240.15b-8, provides in relevant part:

(a) Every broker or dealer who files an application for registration on Form BD shall file with such application, in duplicate original, a statement of financial condition in such detail as will disclose the nature and amount of assets and liabilities and the net worth of such broker or dealer (securities of such broker or dealer or in which such broker or dealer has an interest shall be listed in a separate schedule and valued at the market) as of a date within 30 days of the date on which such statement is filed; *provided, however*, that this requirement shall not apply to a partnership succeeding to and continuing the business of another partnership registered as a broker or dealer at the time of such succession. Attached to such statement shall be an oath or affirmation that such statement is true and correct to the best knowledge and belief of the person making such oath or affirmation. The oath or affirmation shall be made before a person duly authorized to administer such oath or affirmation. If the broker or dealer is a sole proprietorship, the oath or affirmation shall be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer.

* * * * *

(c) The statement of financial condition required by this rule shall constitute a "document supplemental" to such application for registration within the meaning of Section 15 (b) of the Act.

Section 25 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78y (a), provides in relevant part:

Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

No. 14901.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN PIERCE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF.

JOHN G. SOBIESKI,
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Los Angeles 13, California,

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Attorneys for Petitioner.

FILED

JUL 13 1956

PAUL P. O'BRIEN, CLERK

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No. 14901.

IN THE

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JOHN PIERCE,

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Respondent.

PETITIONER'S REPLY BRIEF.

I.

The Opinion Denying Registration Is Not Supported by the Record.

The Commission's Brief, on pages 15 and 20, relies on the testimony of Fox to support the Commission's Opinion. The Brief, like the Commission's Opinion, ignores the finding of the Hearing Examiner concerning Fox:

"Mr. Fox, an elderly druggist changed his testimony on many occasions and in consequence of these vacillations, I attach little credence to his testimony. He appeared to be not only confused but actually to know few of the details concerning this transaction."
[R. 249-27.]

A comparison of the Commission's Opinion and Brief with the Recommended Decision of the Hearing Officer will show that the evidence favorable to Petitioner is ignored by the Commission. This was pointed out in Petitioner's Opening Brief (p. 4). The Commission's Brief, like its Opinion, in our view, is based on an eclectic selection of only the parts of the record deemed unfavorable to Pierce and a disregard of the evidence in his favor. We think the reasoned findings of the Hearing Examiner correctly give a balanced picture of what actually happened at the Hearing.

II.

The Commission's Order Does Not Give Proper Weight, as Required by Law, to the Recommended Decision of the Hearing Examiner.

The Commission's Opinion doesn't discuss *any* of the findings of the Hearing Examiner. But the Supreme Court has said:

"The committee reports also made it clear that the sponsors of the legislation (the Administrative Procedure Act) thought the statute gave significance to the findings of the examiner."

Universal Camera Co. v. N. L. R. B., 340 U. S. 474, 496.

But what "significance" have a set of findings which aren't even discussed when a contrary decision is announced? The answer, in our opinion, is *none*.

III.

The Failure of the Commission to Give Consideration to the Findings of the Hearing Examiner Was Not Induced by Petitioner.

On pages 31 and 32 of the Commission's Brief a criticism was made of Respondent's Brief to the Commission and it was also pointed out that oral argument before the Commission (in Washington, D. C.) wasn't requested until a petition for rehearing was filed. The facts are these.

The trial before the Hearing Examiner lasted about a week. At its conclusion, while the facts were all fresh in mind, I argued the case orally to the Hearing Examiner. This argument was taken down by the reporter and became part of the typewritten transcript of the proceedings. Several weeks later the typewritten transcript was delivered. It contained 678 pages. I read the entire record, prepared a digest, and prepared recommended findings and a brief to the Hearing Examiner. (This Brief, of course, considered all the charges against Pierce including those the Commission in its opinion later agreed were not substantiated.)

The Hearing Examiner's Recommended Decision, 44 pages in length, then came down, recommending that Pierce's registration be permitted to become effective. I considered it well reasoned and fair. I waived exceptions and submitted the case for decision on the basis of his Recommended Decision. The Commission's Staff filed exceptions. But, in my opinion, all this had been considered before. It was, in my opinion, a third rehash.

The facts of the case had been properly analyzed, in my opinion, in my oral argument, in my brief to the Hearing Examiner, and in his 44 page Recommended Decision. I was loath to again review the lengthy record and file a rehash brief.

There is, as the Court knows, a growing legal literature pointing out that administrative proceedings are becoming alarmingly costly, slow, and cumbersome whereas they were originally intended to be expeditious, simple and inexpensive. The Hoover Commission and the Attorney General have made some studies, and constructive recommendations.

Judge Prettyman, Chairman of the President's Conference on Administrative Procedure, writing in the November 1953 issue of the American Bar Association Journal, on the subject "Reducing the Delay in Administrative Hearings" wrote:

"Repetition ought to be forbidden" and again:

"Either give hearing officers autonomous authority or establish quick easy communication between them and their agencies, or some designated agency members, so that interlocutory rulings can become positive and fixed without delay." (Pp. 968-969.)

But while legislation can do much, much also depends on whether or not the agencies themselves desire to make their own procedures expeditious. Economy can best be achieved where there is a will to economize.

My brief to the Commission argued therefore that it should modernize its procedures, in line with these learned recommendations, if, in routine cases, and this is a routine

case, it adopted the policy of accepting the decision of the Hearing Examiner. I think this is the sound practice and one which the Agencies will eventually come to, voluntarily or otherwise. This case seemed to me to be a proper one in which to recommend putting into practice the recommendations for efficiency made in the studies cited in my brief. I considered the argument reasonable and the authorities eminent.

In deciding whether to request oral argument before the Commission in Washington, D. C., I weighed the advantages against the cost, for my client isn't wealthy. I concluded the cost of a trip across the continent from the Pacific Coast to the Atlantic, to argue a routine case in which the recommended decision was favorable, wasn't justified.

The Commission's Opinion was a bombshell. Besides ruling against my client, it didn't discuss the argument I made orally to the Hearing Examiner (contained in the transcript), it didn't discuss my brief to the Hearing Examiner, it didn't discuss the Hearing Examiner's Recommended Decision, and didn't discuss my brief to the Commission. I therefore asked for oral argument on motion for rehearing and was then told the request came too late.

The Commission's brief makes some point (p. 32) that I obtained an extension of time to file the petition for rehearing. The Commission's Opinion came down while I was on vacation near Lake Tahoe. The granting of this extension to permit me to complete my vacation is no

reason why Pierce should be denied registration. These and other side issues raised in the Commission's Brief appear irrelevant.

On page 31 of the Commission's Brief there is, as I interpret it, an implied admission that the Commission "had the benefit of a digest of the record prepared by its Opinion Writing Office." Such digest, judging by the Commission's Opinion, must have differed substantially from the 44 page "Recommended Decision" prepared by the Hearing Examiner who heard the evidence, and saw the witnesses.

The Commissioners are busy men. It would be unreasonable to expect them to personally read the 678 pages of this record and the many exhibits. It is reasonable for them to delegate. It is best, in my opinion, for them to adopt the Hearing Examiner's recommendations in routine cases. It is better, in my opinion, for them to let counsel see, and criticize, the digest on which the Commissioners propose to base their decision. The best man to prepare that digest is, obviously, the learned Hearing Examiner who saw and heard the witnesses. The Commission's brief asserts that it is "singularly lacking in grace" (p. 31) for me to object to the procedure of basing the Commission's decision on a secret staff digest. Permit me to comment that the SEC action in preparing two differing digests of the record, one of which is served on counsel for respondent and the other (the private one) is used as the basis for decision cannot expect to qualify, in my opinion, as an act of grace. On the contrary, I

can see no legitimate reason why the digest which the Commission intends to rely upon should not be the paper served on counsel attempting to protect his client's interest.

IV.

The Penalty Already Imposed on Respondent Is More Than Adequate.

Pierce admittedly engaged in activities as a broker-dealer for several years, involving hundreds of transactions. In one (and only one) of these transactions the Commission finds he behaved improperly to the injury of a member of the public. That was Mr. Hayward (who did not consider that he had been mistreated). Such showing is wholly inadequate to show that the public interest requires that Pierce be forever barred from earning his livelihood as a broker and dealer. The Hayward transaction occurred nearly four and one-half years ago. Pierce has been denied registration over a year and a half. He has been to substantial financial expense in these proceedings. They have also educated him, as to SEC attitudes. The lesson has been driven home.

The people in the securities business, and those regulating it, are all presumably human. "To err is human." One alleged error, in hundreds of transactions, must be kept in perspective. It is believed that further exclusion of Pierce smacks of persecution and not protection of the public.

Conclusion.

“The scope of judicial review is ultimately conditioned and determined by the major premise that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system.”

69 Harv. L. Rev. 274 (1955).

The Commission's Order dated August 16, 1955, should be modified to bring it into accord with the Recommended Decision of the Hearing Examiner who heard, and understood, the evidence. Petitioner's application for registration should be permitted to become effective.

Respectfully submitted,

JOHN G. SOBIESKI,

EDWARD J. DOTSON,

By JOHN G. SOBIESKI,

Attorneys for Petitioner.

United States
Court of Appeals
for the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
John W. Smeed Estate, Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO.,
SAM WAHYOU, R. K. NUTTING and
THOMAS G. LEE, as Trustees for the assets
of Diamond-S Ranch Co., THOMAS G. LEE,
TOY QUONG, JOE SIN, K. R. NUTTING,
YIP K. TOON and HERBERT JANG,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

FILED

JUN 25 1955

CLERK OF COURT, U.S. DISTRICT COURT, NEVADA

No. 14902

United States
Court of Appeals
for the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
John W. Smeed Estate, Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO.,
SAM WAHYOU, R. K. NUTTING and
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Appellees.

Transcript of Record

Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Nevada Corporation. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the
District of Nevada

No. 1029

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, trustees of
JOHN W. SMEED ESTATE, Plaintiffs,

vs.

A. E. CORBARI and MARIE CORBARI, hus-
band and wife, SAM WAHYOU, DIAMOND-S
RANCH CO., a Nevada corporation, SAM
WAHYOU, K. R. NUTTING, THOMAS G.
LEE, A. E. CORBARI, last known directors
of said Diamond - S Ranch Co., a Nevada cor-
poration which has forfeited its charter, as
trustees for said corporation, Defendants.

COMPLAINT

The plaintiffs, for claim against the defendants,
complaint and alleges as follows:

First Count

Plaintiffs, for a first count, allege:

I.

That the plaintiffs are the trustees under the
testamentary trust of John W. Smeed, deceased,
under the will of John W. Smeed, deceased, duly
admitted to probate in the Probate Court of Canyon
County, Idaho, and are residents and citizens of the
State of Idaho.

II.

That the defendants A. E. Corbari and Marie Corbari are husband and wife, and are residents and citizens of the State of Nevada; that the defendant Diamond - S Ranch Co. [2] is a corporation organized under the laws of the State of Nevada, with its principal office at Reno, Nevada, and is a citizen of the State of Nevada; that said Diamond - S Ranch Co. has forfeited its charter, the same having been revoked by the State of Nevada on March 3, 1952. That the last known directors of said corporation are Sam Wahyou, A. E. Corbari, K. R. Nutting and Thomas G. Lee, whose addresses and residences as set out in the last annual list of its officers and directors as filed with the Secretary of State of the State of Nevada is P.O. Box 7, Golconda, Nevada.

III.

That the matter of controversy in this suit exceeds, exclusive of interest and costs, and the sum of \$3,000.00.

IV.

That the defendants A. E. Corbari and Marie Corbari on or about December 31, 1948, made and executed and delivered to John W. Smeed, their certain promissory note, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof; that said John W. Smeed is now deceased and the plaintiffs herein, as trustees under his last will and testament, are now the owners and holders of said note.

V.

That the defendants A. E. Corbari and Marie Corbari owe to the plaintiffs the amount of said note, plus interest [3] less \$750.00 paid on the principal thereof on or about November 22, 1950.

Second Count

Further complaining of the above defendants and for a second count plaintiffs allege:

I.

Plaintiffs reallege all matters contained in Paragraphs I, II, and III and IV and V of said First Count contained in this complaint, and further alleges:

II.

That on or about the 31st day of October, 1950, the Diamond - S Ranch Co. did not exist as a corporation, having been dissolved under the laws of the State of Nevada; that the defendants were the owners of a fractional share, being $310/1572.5$ ths of the assets of the said corporation as tenants in common with other persons who had been stockholders of the said corporation at the time of its dissolution on September 7, 1950; that the value of said fractional share owned by the defendants was not less than \$50,000.00; that on or about October 31, 1950, the defendants A. E. Corbari and Marie Corbari assigned, transferred and set over all of their interest in the assets of the said dissolved Nevada corporation as security for their note, Exhibit "A" to this complaint, copy of which said assignment is at-

tached to this complaint as Exhibit "B" and made a part hereof. That thereafter, on or about the 7th day of December, 1951, the corporate charter of the Diamond - S Ranch Co., a corporation, was revived under the laws of the State of Nevada and the said [4] corporation resumed possession of the assets theretofore owned by those persons who had been stockholders and who had possessed such assets as tenants in common, including the interest of A. E. Corbari and Marie Corbari, as aforesaid, assigned to W. W. Lord, trustee, as aforesaid; that on March 3, 1952, the said Diamond - S Ranch Co., a corporation revived as aforesaid, forfeited its charter, the same being revoked by the State of Nevada.

Third Count

Further complaining of the defendants and for a third count plaintiffs allege:

I.

Plaintiffs reallege all matters contained in Paragraphs I, II, III, IV, and V of the First Count and in Paragraph II of the Second Count, and further allege:

II.

That Sam Wahyou, one of the defendants herein, was a stockholder in the Diamond - S Ranch Co., a Nevada Corporation, at the time of its dissolution; that the defendants A. E. Corbari and Sam Wahyou subsequent to the 31st day of October, 1950, conspired to defraud the plaintiffs of their property under said assignment by causing the charter of the

Diamond - S Ranch Co. to be revived without reflecting in the books and records of the corporation the interest of the defendants, A. E. Corbari and Marie Corbari, in the assets of the said corporation during the period of its dissolved status, and by causing the interest of A. E. Corbari and Marie Corbari to be transferred to the defendant Sam Wahyou, with knowledge of the plaintiffs' interest and with the intent and purpose of depriving the plaintiffs of their rights under said assignment. [5]

Wherefore, Plaintiffs demand:

1. On the first count, that plaintiffs have judgment against defendants A. E. Corbari and Marie Corbari for the sum of \$14,291.34, together with interest on the sum of \$15,041.34, at the rate of five percent per annum from December 31, 1948, to December 31, 1949, and interest on said sum of \$15,041.34 at the rate of eight percent per annum from December 31, 1949, to November 22, 1950, and interest on the sum of \$14,291.34 at the rate of eight percent per annum from November 22, 1950, to date of judgment herein; for \$3500.00 for attorney's fees and for the costs of this action.

2. On the second count, that the assets of the defendant Diamond - S Ranch Co. be ordered by this court to be impressed with a lien by virtue of the assignment from the defendants A. E. Corbari and Marie Corbari, to the plaintiffs to secure the payment of the amount due from the defendants A. E. Corbari and Marie Corbari to the plaintiffs on

the said note up to 310/1572.5ths of the net value of the assets of the said corporation.

3. On the third count, alternatively, that the plaintiffs have judgment against the defendant, Sam Wahyou, in damages for the full amount of the obligation found due and owing to them from the defendants A. E. Corbari and Marie Corbari, including interest, attorneys' fees, and costs, as prayed in Paragraph I of this prayer.

JAMES A. CALLAHAN,
CARVER, McCLENAHAN &
GREENFIELD,
SMITH & EWING,

/s/ By LAURENCE N. SMITH,
Attorneys for Plaintiff.

[6]

Duly Verified. [7]

EXHIBIT "A"

"\$15,041.34 Caldwell, Idaho, December 31st, 1948

On Demand: or if no demand is made, then on December 31st, 1949 after date, I, we, or either of us, promise to pay to John W. Smeed or order, Fifteen Thousand Forty one and 34/1000 Dollars. For value received, negotiable and payable at The First National Bank of Caldwell, Caldwell, Idaho, in Legal Tender of the United States of America, with interest at the rate of five per cent. per annum from date, payable annually, and a reasonable attorney's fee in case this note or any part thereof, is collected by an attorney, either with or without suit. If this note is not paid at maturity it shall there-

after bear interest at the rate of Eight per cent. per annum until paid, both before and after judgment. All makers and endorsers of this note each hereby expressly waive demand, notice of non-payment and protest, and guarantee the payment of this note at maturity or at any time thereafter.

A. E. Corbari

Marie Corbari

No.....

Due Rt. No. 1, Box 42, P.O. Tracy, California [8]

EXHIBIT "B"

ASSIGNMENT

Know All Men By These Presents, That Whereas, I, A. E. Corbari, am indebted on a certain note given to John W. Smeed, dated December 31, 1948, due December 31, 1949, in the principal amount of \$15,041.34, plus interest at the rate of five percent per annum, said interest amounting on October 25, 1950, to the sum of \$1366.08, together with costs incurred in connection therewith in the sum of \$775.00, and the sum of \$2.06 interest per day until the payment of said indebtedness.

Now, Therefore, In consideration of the premises, and to secure the payment of said indebtedness, I do hereby sell, assign, transfer and set over unto W. W. Lord, as Trustee, all my rights, title and interest in and to all of my partnership interest in the assets of a certain partnership formed by reason of the dissolution of Diamond - S Ranch Co., a Nevada corporation, and in and to any profits arising from

the operation of said partnership. I further state that I was the owner of 310 shares of stock in said Diamond - S Ranch Co., and that the total outstanding shares of stock in said Company was 1,572½ shares, and that my interest in the partnership and the assets of the partnership formed in connection with the dissolution of said Company, is in the same proportion as was my holding of stock in the total outstanding issue thereof. And I hereby grant unto said W. W. Lord, as Trustee, full power, in my name or otherwise, to hold and operate said partnership interest, and the assets thereof, in the same manner as I could personally do, until the payment in full of said indebtedness and any other costs which may be incurred in connection with any transaction regarding collection of said indebtedness.

This assignment is made upon the express condition that if I shall pay or cause to be paid to the said W. W. Lord, as trustee, his successor or assigns, the above-recited indebtedness on or before April 25, 1951, then this assignment shall be void and of no effect.

In case the said W. W. Lord, as trustee, his successors or assigns, shall collect the moneys due on the said indebtedness he or they shall, after retaining the full amount of the above indebtedness, and the reasonable costs and expenses of collection, pay over the surplus, if any, to me, or my successors, administrators, or assigns.

In case of nonpayment of said indebtedness on or before April 25, 1951, I hereby appoint and con-

stitute said W. W. Lord, as trustee, his successors or assigns, my attorney, irrevocable, with power of substitution, to take possession of, and if he so desires, to sell at any time after said payment is due, with or without notice, at the option of said Trustee, the whole or any part of said security, either at public or private sale, at his discretion, and the proceeds thereof to be applied on the payment of said indebtedness, and any surplus after payment of said indebtedness and expenses to be subject to my order. In like manner I agree to pay on demand to said W. W. Lord, as trustee, his successors or assigns, whatever deficit may result after applying the net proceeds of such sale to the payment of said indebtedness.

And I, Marie Corbari, the wife of said A. E. Corbari, hereby join in this assignment and consent thereto, to the same extent as [9] though named in the body of said assignment.

In Witness Whereof, We have hereunto set our hands and seals, this 31 day of October, 1950.

[Seal]	A. E. Corbari
	A. E. Corbari
[Seal]	Marie Corbari
	Marie Corbari

State of California,
County of San Joaquin—ss.

On this 31 day of October, 1950, before me, Wm. Larsen, a Notary Public in and for said State, personally appeared A. E. Corbari and Marie Corbari,

husband and wife, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal] Wm. Larsen,
Notary Public for California, Residing at Tracy,
California.

Assignment

A. E. Corbari to W. W. Lord, Trustee

(C) Dated October 31, 1950 (I)

Recorded at request of Smith & Ewing March 27, 1951 at 15 Min. past 9 o'clock A.M. Book I page 175 Leases & Contracts Records of Humboldt Co., Nev.

J. L. Germain, County Recorder
....., Deputy

No. 84745

Return to Smith & Ewing, Box 111, Caldwell, Idaho. [10]

[Endorsed]: Filed August 19, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT DIAMOND-S
RANCH CO., a Nevada Corporation

Now comes the Defendant Diamond-S Ranch Co., a Nevada Corporation, and answering the allegations contained in the First Count set forth in the Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations set forth in Paragraph I of said First Count, this Defendant has no information or belief sufficient to enable it to answer said allegations, and basing its denial upon such lack of information or belief, denies each and every, all and singular, the allegations therein contained.

II.

Answering the allegations contained in Paragraph II of the First Count, this Defendant admits that the Defendants A. E. Corbari and Marie Corbari are husband and wife and are residents and citizens of the State of Nevada and that the Diamond-S Ranch Co. is a corporation organized and existing under the laws of the State of Nevada with its principal office at Reno, Nevada, and is a citizen of the State of Nevada; alleges that the said Diamond-S Ranch Co. failed to file with the Secretary of State of Nevada a list of the Officers and Directors and Designation of its Resident Agent in this State for the period commencing July 1, 1951, as

required by Section 1, Chapter 180, of the General Corporation Laws of 1925, as amended, (Paragraph 1804 of the Domestic and Foreign Corporation Laws of the State of Nevada), and that by reason thereof it forfeited its right to carry on business in the State of Nevada, but that on the 11th day of September, 1952, said Corporation cured said default as provided in Section 6 of Chapter 180, of the General Corporation Laws of 1925, as amended (Paragraph 1809 of the Domestic and Foreign Corporation Laws of the State of Nevada), whereupon its Charter was reinstated and said reinstatement expressly authorized said Corporation to transact business in the same manner as if the filing fee or the license tax had been paid when due, and that by reason of said reinstatement, said Corporation was restored to all of its powers, property, etc., the same as if no forfeiture had occurred, and that on said 11th day of September, 1952, the Secretary of State of the State of Nevada issued his Certificate of Reinstatement as provided in Section 6 of Chapter 180, of the General Corporation Laws of 1925, as amended (Paragraph 1809 of the Domestic and Foreign Corporation Laws of the State of Nevada); that except as expressly herein admitted, denies each and every, all and singular, the balance of the allegations contained in Paragraph II of said First Count. [12]

III.

Answering the allegations contained in Paragraph IV of said First Count, this Defendant has no information or belief sufficient to enable it to

answer said paragraph, and basing its denial upon such lack of information or belief, denies each and every, all and singular, the allegations therein contained;

IV.

Answering the allegations contained in Paragraph V of said First Count, this Defendant has no information or belief sufficient to enable it to answer said allegations, and basing its denial upon such lack of information or belief, denies each and every, all and singular, the allegations therein contained.

Answering the allegations contained in the Second Count set forth in said Complaint, this Defendant admits, denies and alleges as follows, to-wit:

I.

This Defendant re-alleges herein, the same as if herein again fully set forth, this Defendant's answer to Paragraphs I, II, IV and V of the First Count set forth in Plaintiff's Complaint which are incorporated by reference in Paragraph I of the Second Count of said Complaint.

II.

Answering the allegations contained in Paragraph II of said Second Count, this Defendant alleges that on September 7, 1950, said Diamond-S Ranch Co. filed a Certificate of Dissolution in the Office of the Secretary of State of the State of Nevada and that on December 7, 1951, said Cor-

poration, having elected to renew and revive said Corporate Charter, filed in the Office of the Secretary of State of Nevada its Certificate of Renewal and Revival of its Corporate Charter, and said Certificate provided that said renewal [13] or revival of the Corporate Charter of said Corporation was to be effective September 7, 1950, in accordance with Section 93 (3), Chapter 177, General Corporation Law of 1925, as amended (Chapter 1692 of the Domestic and Foreign Corporation Laws of the State of Nevada), and that by reason of said revival or renewal, said Diamond-S Ranch Co. is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada and authorized to transact the business of said Corporation; that except as expressly herein admitted, this Defendant denies each and every, all and singular, the balance of the allegations contained in said Paragraph II of said Second Count; denies that any fractional share whatsoever was owned by the Defendants or any of them or was worth not less than \$50,000.00 or any other sum or at all;

Answering the allegations contained in the Third Count set forth in said Complaint, this Defendant admits, denies and alleges as follows, to-wit:

I.

This Defendant re-alleges herein, the same as if herein again fully set forth, this Defendant's answers to Paragraph I, II, IV and V of the First Count set forth in Plaintiff's Complaint which are

incorporated by reference in Paragraph I of the Third Count and, likewise, re-alleges herein, the same as if herein again fully set forth, this Defendant's answer to Paragraph II of Plaintiffs' Second Count set forth in said Complaint which is incorporated by reference in said Paragraph I of said Third Count.

II.

Answering the allegations contained in Paragraph II of said Third Count, this Defendant alleges that Sam Wahyou, one of the Defendants herein, was and is a stockholder in the Diamond-S Ranch Co., a Nevada Corporation, and further alleges that said Sam Wahyou [14] purchased the corporate stock previously owned by A. E. Corbari, to-wit: 310 Shares, on May 21, 1951, for a valuable consideration, and without notice of any claims of Plaintiffs, if any they had; that except as expressly herein admitted, denies each and every, all and singular, the balance of the allegations therein contained.

As and for a First and Affirmative Defense this Defendant alleges as follows:

I.

That said Complaint, and each and every count thereof, fails to state a claim against his answering Defendant upon which relief can be granted.

Wherefore, this Defendant prays that Plaintiffs take nothing by virtue of their Complaint and that

it be dismissed hence with its costs of Court herein incurred.

/s/ JOHN DAVIDSON,

Attorney for Defendant Diamond-S Ranch Co., a
Nevada Corporation. [15]

Duly Verified. [16]

[Endorsed]: Filed September 20, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, A. E. CORBARI
AND MARIE CORBARI

Comes Now the defendants, A. E. Corbari and Marie Corbari, by and through their attorney John S. Halley, and for answer and defense to plaintiffs' complaint, on file herein, admit, deny and aver as follows:

I.

Answering the allegations contained in paragraph I of the first count of said complaint, the said defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in [17] said paragraph.

II.

Answering the allegations contained in paragraph II of the first count of said complaint, the said defendants admit that they are husband and wife, and are residents and citizens of the State of Nevada, and that Diamond-S Ranch Co. is a cor-

poration organized under the laws of the State of Nevada, with its principal office therein, and is a citizen of the State of Nevada.

Further answering said allegations, the said defendants allege that the said Diamond-S Ranch Co. failed to file with the Secretary of State of Nevada a list of the Officers and Directors and Designation of its Resident Agent in this State for the period commencing July 1, 1951, as required by Section 1, Chapter 180, of the General Corporation Laws of 1925, as amended, (paragraph 1804 of the Domestic and Foreign Corporation Laws of the State of Nevada), and that by reason thereof it forfeited its right to carry on business in the State of Nevada, but that on the 11th day of September, 1952, said Corporation cured said default as provided in Section 6 of Chapter 180, of the General Corporation Laws of 1925, as amended (Paragraph 1809 of the Domestic and Foreign Corporation Laws of the State of Nevada), whereupon its Charter was reinstated and said reinstatement expressly authorized said Corporation to transact business in the same manner as if the filing fee or the license tax had been paid when due, and that by reason of said reinstatement, said Corporation was restored to all of its powers, property, etc., the same as if no forfeiture had occurred, and that on said 11th day of September, 1952, the Secretary of State of the State of Nevada issued his Certificate of Reinstatement as provided in [18] Section 6 of Chapter 180 of the General Corporation Laws of 1925, as amended (Paragraph 1809 of the Domestic and For-

eign Corporation Laws of the State of Nevada); that except as expressly herein admitted, denies each and every, all and singular, the balance of the allegations contained in paragraph II of the First Count.

III.

Answering the allegations contained in paragraph IV of the first count of said complaint, these defendants admit that on or about the 31st day of December, 1948, they made, executed and delivered to John W. Smeed the promissory note herein referred to, and allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

IV.

Answering the allegations contained in paragraph V of the first count of said complaint, these defendants deny they owe to plaintiffs the amount of said note, plus interest, less Seven Hundred Fifty Dollars (\$750.00) paid on the principal thereof on or about November 22, 1950, and allege that they have paid thereon the further sum of One Thousand Dollars (\$1,000.00), plus interest, and allege that they have paid the plaintiffs on account of said note the total sum of One Thousand Seven Hundred Fifty Dollars (\$1,750.00), plus interest.

Answering the Allegations Contained in the Second Count of said Complaint, These Defendants Admit, Deny and Aver as follows:

I.

Answering the allegations contained in paragraph I of the second count of said complaint, these defendants re-allege [19] at this place as if set forth in haec verba their answers to paragraphs I, II, III, IV, and V of the first count of said complaint.

II.

Answering the allegations contained in paragraph II of the second count of said complaint, these defendants admit that on the 31st day of October, 1950, they executed and acknowledged the assignment, copy of which is attached to said complaint as Exhibit "B".

Further answering the allegations contained in said paragraph, these defendants allege that on September 7, 1950, said Diamond-S Ranch Co. filed a Certificate of Dissolution in the Office of the Secretary of State of the State of Nevada and that on December 7, 1951, said Corporation, having elected to renew and revive said Corporate Charter, filed in the Office of the Secretary of State of Nevada its Certificate of Renewal and Revival of its Corporate Charter, and said Certificate provided that said renewal or revival of the Corporate Charter of said Corporation was to be effective September 7, 1950, in accordance with Section 93 (3), Chapter 177, General Corporation Law of 1925, as amended (Chapter 1692 of the Domestic and Foreign Corporation Laws of the State of Nevada).

Answering the Allegations Contained in the Third Count of Said Complaint, These Defendants Admit, Deny and Aver as follows:

I.

Answering the allegations contained in paragraph I of the Third Count of said complaint, these defendants re-allege as if set forth at this place haec verba their answers [20] to paragraphs I, II, III, IV and V of the first count, and paragraph I of the second count of said complaint.

II.

Answering the allegations contained in paragraph II of the Third Count of said complaint, these defendants deny each and every, all and singular, the allegations therein contained, except that they admit that Sam Wahyou was a stockholder in the Diamond-S Ranch Co. on the 7th day of September, 1950.

Wherefore, these defendants pray that plaintiffs take nothing by reason of their complaint, that the same be dismissed, and that they have their costs and expenditures.

/s/ JOHN S. HALLEY,

Attorney for Defendants, A. E.

Corbari and Marie Corbari [21]

[Endorsed]: Filed November 10, 1952.

[Title of District Court and Cause.]

MOTION

Come Now the plaintiffs and move this Honorable Court for leave to file a First Amended Complaint herein, copy of which proposed Amended Complaint is attached hereto, and adding new parties as shown therein, and for cause therefor, state:

That facts learned from the taking of discovery depositions herein make it desirable and necessary that additional counts be stated and that additional persons be made parties defendant.

Dated this 25th day of May, 1954.

SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,
PIKE & McLAUGHLIN,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs [22]

NOTICE OF MOTION

To: A. E. Corbari and Marie Corbari, Defendants above named, and to John S. Halley, Esq., their attorney, and to Diamond-S Ranch Co., Defendant above named, and to John Davidson, Esq., its attorney:

Please Take Notice, that the undersigned will bring the above Motion on for hearing before this Court at Carson City, Nevada, on Monday, the 7th

day of June, 1954, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,
PIKE & McLAUGHLIN,
/s/ By MILES N. PIKE,
Attorneys for Plaintiffs

Acknowledgment of Service attached. [23]

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

This matter came on for hearing this 12th day of October, 1954, upon the motion of the plaintiffs for leave to file an amended complaint, Miles N. Pike and Laurence N. Smith appearing for plaintiffs, John Davidson and Gordon J. Aulik appearing for the defendant, Diamond-S Ranch Co., and John S. Halley appearing for the defendants, A. E. Corbari and Marie Corbari.

The matter being argued was submitted to the Court for determination, and after due consideration it is

Ordered that said motion for leave to file an amended complaint be and it is hereby granted.

It is further Ordered that pretrial be continued

until such time as responsive pleadings have been filed to the amended complaint.

Dated: October 12th, 1954.

/s/ JOHN R. ROSS,

United States District Judge [39]

[Endorsed]: Filed November 12, 1954.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

The plaintiffs, for claim against defendants, complain and allege as follows:

First Count

The plaintiffs, for a First Count, allege:

I.

That plaintiffs, G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and John H. Smeed are the trustees under the testamentary trust of John W. Smeed, deceased, under his will, duly admitted to probate in the Probate Court of Canyon County, Idaho, and are residents and citizens of the State of Idaho.

II.

That defendants, A. E. Corbari, otherwise known as Archie E. Corbari, and Marie Corbari are husband and wife, and are [40] citizens of the State of Nevada; that defendant, Sam Wahyou, individually

and as trustee, is a resident and citizen of the State of California; that defendant, Diamond S. Ranch Co., was incorporated under the laws of the State of Nevada and holds itself out as being a Nevada corporation at the present time; that if defendant corporation is in existence at all at present, it has its principal office at Galconda, Nevada, and is a citizen of the State of Nevada; that defendant, Forrest E. Macomber, is a resident and citizen of the State of California; that defendants, K. R. Nutting and Thomas G. Lee, trustees, are residents and citizens of the State of California; and that defendants, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, Herbert Jang, otherwise known as Herbert Jong, and D. W. Zignego are citizens and residents of the State of California.

III.

That the matter of controversy in this suit exceeds, exclusive of interest and costs, the sum of \$3,000.00.

IV.

That said defendants, A. E. Corbari and Marie Corbari, on or about December 31, 1948, made and executed and delivered to John W. Smeed, their certain promissory note, a copy of which is attached hereto marked Exhibit "A" and made a part hereof; that said John W. Smeed is now deceased and the plaintiffs, herein, as trustees under his last will and testament, are now the owners and holders of said note.

V.

That neither of the defendants Corbari, numbered 1 and 2, paid said note or any part thereof on December 31, 1949 and it became necessary to place said note in the hands of an attorney for collection; that said defendants or one of them paid plaintiffs \$750.00 on account of the principal of said note or on or about November 22, 1950, but neither of said defendants, nor anyone else has made any other payments on account of said note although [41] repeated demands have been made upon said defendants that the same be paid; and that it became necessary to file this suit to collect said note.

VI.

That said defendants Corbari owe to plaintiffs the amount of said note less said payment, namely, the sum of \$14,291.34, plus interest at 5% per annum on the sum of \$15,041.34 from December 31, 1948 to December 31, 1949, plus interest on \$15,041.34 at 8% per annum from December 31, 1949 until November 22, 1950, plus interest on \$14,291.34 at 8% per annum from November 22, 1950, until paid, plus a reasonable attorney's fee for services rendered to collect said note.

Second Count

Further complaining of the above defendants and for a Second Count, plaintiffs allege:

I.

Plaintiffs reallege all matters contained in said First Count of this complaint, and further allege:

II.

That on the 7th day of September, 1950, defendant number 4, Diamond S. Ranch Co., was duly incorporated as a corporation under the laws of the State of Nevada and was and had been doing business as a ranching corporation under said laws. On that day said defendant corporation filed with the Secretary of State of Nevada the papers necessary to effect a voluntary dissolution of said corporation under the provisions of Section 1664 (64) of the code of laws of the State of Nevada, the Secretary issued this certificate therein provided for that said corporation was dissolved, and on that day said corporation was dissolved.

III.

That upon the day said corporation was dissolved, defendants A. E. Corbari, Sam Wahyou, K. R. Nutting and Thomas G. Lee, were [42] the duly elected and qualified directors of said corporation and under the provisions of Section 1665 (65) of said code became trustees of the assets of said corporation with the powers and duties of such trustees as are provided by law.

IV.

That upon said day said corporation owned the property situated in Humboldt County, Nevada, described in Exhibit "C" to this First Amended Complaint, attached hereto and made a part hereof, and the then stockholders of said corporation became owners of said property.

V.

That upon said day the stockholders of said cor-

poration were the following named persons and they owned the number of shares hereinafter set opposite their names, and the total of 1572.5 shares owned by them was all of the stock of said corporation issued and outstanding:

Defendant Sam Wahyou	321
Defendant Thomas G. Lee	80
Defendant Toy Quong	50
Defendant Joe Sin	521½
Defendant A. E. Corbari	310
Defendant K. R. Nutting	629
Defendant Yip K. Toon	50
Defendant Herbert Jang or Jong	80

Total 1,572½

VI.

That on or about the 22nd day of February, 1950, defendant A. E. Corbari agreed with plaintiffs for a valuable consideration to assign his interest in the defendant corporation to plaintiffs to secure the note, Exhibit "A" herein; that on or about October 31, 1950, said assignment was reduced to writing and signed by said defendants A. E. Corbari and Marie Corbari, a copy of which said assignment is attached hereto as Exhibit "B" and made a part hereof; and that said assignment was recorded March 27, 1951, among the Humboldt County, Nevada records; and that defendants [43] Wahyou and Macomber had notice and knowledge of said agreement prior to their actions complained of herein.

VII.

That after said dissolution, defendants A. E. Corbari, Wahyou, Nutting and Lee, and each of them, willfully, maliciously and fraudulently failed to carry out the duty of each of them as fiduciaries to settle the affairs of the dissolved corporation, collect its outstanding debts, pay its creditors and distribute and pay the balance of its assets among the persons who had been stockholders of the corporation or their legal representatives, but continued the business for which said corporation had been established, and their failure and breach of duty has continued to this day, and they wrongfully used the assets of said corporation for that purpose.

VIII.

That defendants, A. E. Corbari, Wahyou, Nutting and Lee, in violation of their duties as fiduciaries and in furtherance of their unlawful action aforesaid, falsely and fraudulently caused to be executed and filed on December 7, 1951, with the Secretary of State of Nevada a so-called certificate of revival or renewal of corporate charter of said corporation in which they admitted that they were carrying on such business; that by said certificate and an affidavit called "Appointment of Agents" filed therewith, defendants, Nutting, Wahyou, Lee, Jang or Jong, Quong, Sin and Toon falsely and fraudulently represented and swore, under oath, that the execution and filing of said certificate was authorized by the written and unanimous consent of all of the stockholders of said corporation, and the

names of said stockholders were therein set forth, together with the number of shares of said corporation entitled to vote held by each of them, when in matter of fact and law there were no stockholders entitled to vote after the dissolution of the corporation, and, if there were, the successors in interest to Corbari's shares in the [44] corporation were not mentioned in said papers nor had such successors in interest given any consent to said papers or the filing thereof; and that in said papers the said defendants further falsely represented and swore under oath that defendant Wahyou was the owner of 631 shares of the corporate stock when as a matter of fact he only owned 321 shares, if he owned any.

IX.

~~That the actions of defendants complained of in this count have hindered and delayed the payment of the obligation due plaintiffs and defrauded them.~~

Third Count

Further complaining of the defendants and for a Third Count, plaintiffs allege:

I.

Plaintiffs reallege all matters contained in the First and Second Counts of this First Amended Complaint.

II.

Plaintiffs allege that at a time when defendant corporation was in a state of dissolution, to-wit, on or about May 21, 1951, defendant Wahyou, acting through his agent and attorney, defendant Macom-

ber, purported to purchase at a so-called pledge foreclosure sale the 310 shares of stock of defendant, A. E. Corbari, in said corporation; that said supposed sale of said stock took place in Stockton, California, where the certificates allegedly evidencing the ownership of said shares had their situs; that this purported sale was conducted by defendant Macomber as agent for defendant Wahyou without notice to plaintiffs or knowledge of the same by them and at a time when defendants Wahyou and Macomber well knew of plaintiffs' interest in defendant corporation, as aforesaid; that the purchaser of said certificates was one Gordon J. Aulik as agent for defendant Wahyou; that said purported sale [45] of stock to defendant Wahyou was illegally conducted, fraudulent and invalid, and ineffective to transfer to defendant Wahyou any interest in defendant corporation, or for any purpose.

III.

~~Plaintiffs also allege that if this sale did transfer~~ any interest of defendants Corbari in said corporation or in its assets, or stock, defendants Macomber and Wahyou violated the duties created by their fiduciary relationship as trustees and attorney for the trustee; and that Sections 2224, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, and 2237 of the code of laws of the State of California applied; that the pertinent portions of said Sections are set forth in Exhibit "D" attached hereto and made a part hereof; and that said Sections were in full force and effect at the time of said sale.—

Fourth Count

Further complaining of defendants and for a Fourth Count, plaintiffs allege:

I.

Plaintiffs reallege all matters contained in the First, Second and Third Counts of this First Amended Complaint.

II.

Plaintiffs are informed and believe, and therefore allege, that defendants Zignego and Macomber assert an interest in the defendant corporation and its assets by reason of a purported pledge of defendant Corbari of his 310 shares of stock; that any such pledge was invalid and ineffective to pass any such interest; and that if such pledge did pass any such interest, it became ineffective and was discharged.

III.

That defendants, A. E. Corbari, Wahyou and Macomber, and each of them, have conspired each with the other to hinder, delay and defraud plaintiffs by such purported pledge and by the [46] acts complained of in this complaint and to deprive plaintiffs of their rights under the said assignment to them; and that the acts of said defendants pursuant to said conspiracy have hindered and delayed and defrauded plaintiffs.

Wherefore, plaintiffs demand:

1. Judgment against defendants Corbari for the

sum of \$14,291.34, together with interest on the sum of \$15,041.34 at 5% per annum from December 31, 1948 to December 31, 1949, interest on the sum of \$15,041.34 at 8% per annum from December 31, 1949 to November 22, 1950, interest on the sum of \$14,291.34 at 8% per annum from November 22, 1950, until paid, a reasonable attorney's fee for representing plaintiffs in attempting to collect said note and prosecuting this action and the costs thereof.

2. That defendant trustees be removed and a receiver be appointed to take over the assets of the former corporation Diamond S. Ranch Co., wind up its affairs, pay its debts and distribute the balance of its assets among those entitled.

3. That this court decree that plaintiffs have a proportionate interest in the property described in this complaint and in any other assets of said former corporation.

4. That this court require defendants Corbari, Wahyou, Nutting, Lee, Quong, Sin, Toon and Jang or Jong, and each of them, to account for any property described herein and any property received by them, or any of them, from the former or present corporation Diamond S. Ranch Co., and for any property coming into their hands through said former or present corporation, or through the operation of the business for which it was organized, or through the conduct of any business in its name or any similar name.

5. That this court enjoin said defendants, and

each of them, pendente lite and permanently, from disposing of any such [47] property in their, or any of their, possession, charge, or control until the claims of plaintiffs and others interested in such property be satisfied.

6. That the assets of said former or present corporation be ordered by this court to be impressed with a lien for the payment of the obligation due plaintiffs described in the first prayer hereof.

7. That the court order the property and assets to which the lien of plaintiffs has attached, sold, and plaintiffs paid from the net assets of the sale.

8. That plaintiffs have judgment against defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang or Jong, and each of them, for the payment of said obligation.

9. For such other and further relief as to the court may seem meet and proper.

SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,
PIKE & McLAUGHLIN,

/s/ By GEORGE C. GREENFIELD,
Attorneys for Plaintiffs

Duly Verified. [48]

[Printer's Note: Exhibit "A" and "B" are duplicates of Exhibit "A" and "B" attached to Complaint set out at pages 8 to 12.]

EXHIBIT "C"

In Humboldt County, Nevada:

Parcel No. 1

Twp. 35 N. R. 39 E. Mt. Diablo Meridian: Section 22: $E\frac{1}{2}$ $NE\frac{1}{4}$; Section 23: West Half; Section 27: East Half.

Twp. 36 N. R. 39 E.: Section 13: All; Section 14: $N\frac{1}{2}$ $NE\frac{1}{4}$; Section 24: All.

Twp. 36 N. R. 40 E.: Section 18: $W\frac{1}{2}$ $SW\frac{1}{4}$ and $SE\frac{1}{4}$ $SW\frac{1}{4}$; Section 19: All; Section 20: $W\frac{1}{2}$; $SW\frac{1}{4}$ of $SE\frac{1}{4}$, and that portion of the $SE\frac{1}{4}$ $SE\frac{1}{4}$ lying Westerly of the Golconda-Paradise Valley County Road leading from the Central Pacific Railroad to the steel bridge across the Humboldt River.

Also, that portion of the $SW\frac{1}{4}$ $NE\frac{1}{4}$ and $N\frac{1}{2}$ $SE\frac{1}{4}$ of said Section 20 described as follows: Commencing at the SE corner of $NE\frac{1}{4}$ $SE\frac{1}{4}$ of said Sec. 20; thence North along the East line of said Section a distance of 214.5 feet; thence North 45 deg 1' 30" West a distance of 1327.1 feet to a point 100 feet Southwesterly from an old ditch 2' x 2' x 6'; thence North 67 deg. 56' 30" West 1226.3'; thence N. 74 deg. 28' West 648.9' to a point 100 feet SWrly from an old ditch; thence S. 0 deg. 7' E. 1810.5; thence North 89 deg. 30' E. 2698.8' to the point of beginning.

Section 21: A portion of $W\frac{1}{2}$ of $SW\frac{1}{4}$.

Section 22: All of $SW\frac{1}{4}$ $SW\frac{1}{4}$.

Section 28: $NE\frac{1}{4}$; $E\frac{1}{2}$ $NW\frac{1}{2}$; also a portion of $SE\frac{1}{4}$ and a portion of $E\frac{1}{2}$ of $SW\frac{1}{4}$.

Section 29: $W\frac{1}{2}$; also a portion of $E\frac{1}{2}$.

Section 30: $N\frac{1}{2}$ of $NE\frac{1}{4}$; $SE\frac{1}{4}$ $NE\frac{1}{4}$; $E\frac{1}{2}$ of $SE\frac{1}{4}$.

Section 32: $NW\frac{1}{4}$, excepting that portion heretofore conveyed to Golconda Cattle Company by deed, Book 44 page 401, records of Humboldt County, Nevada.

Section 34: $N\frac{1}{2}$ $NW\frac{1}{4}$; $NW\frac{1}{4}$ $NE\frac{1}{4}$.

Section 36: $NW\frac{1}{4}$ $NW\frac{1}{4}$.

Right for Easement in and to tract of land in $SE\frac{1}{4}$ $NW\frac{1}{4}$ Sec. 30, Twp. 36 N. 41 E. for the purpose of storing and conserving water.

Town of Golconda:

Lots 1, 2, 3, 4, 15, 16, 17, 18, in Block 2;

Lots 1 and 18, Block 3;

Lots 1, 2, 14, 15, 16, 17, Block 4;

Lot 5, Block 6:

All in the Town of Golconda, Humboldt County, according to the official plat of said Town as the same is filed in the office of the County Recorder of said Humboldt County. [52]

Parcel No. 2

Twp. 36 N. R. 39 E. Mt. Diablo Meridian:

Section 12: $E\frac{1}{2}$ $SE\frac{1}{4}$.

Twp. 36 N. R. 40 E.:

Section 7: $S\frac{1}{2}$.

Section 8: $S\frac{1}{2}$.

Section 16: $W\frac{1}{2}$.

Section 17: All.

Section 18: $SE\frac{1}{4}$ $SE\frac{1}{4}$; $N\frac{1}{2}$ $SE\frac{1}{4}$, NE, S of $NW\frac{1}{4}$ (says this is exactly as it was written), $N\frac{1}{2}$,

NW $\frac{1}{4}$, and a portion of SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ of SE $\frac{1}{4}$ (described by metes and bounds).

Section 20: Portion of NE $\frac{1}{4}$ and portion of N $\frac{1}{2}$ of SE $\frac{1}{4}$.

Section 21: Portion of NW $\frac{1}{4}$ and portion of N $\frac{1}{2}$ of SW $\frac{1}{4}$.

Section 27: All.

Also, a strip of land 40 feet in width adjoining the right-of-way of Western Pacific Railroad on the SWrly side and commencing at the Golconda-Paradise Valley road near where said road crosses the track of said railway company and running North-easterly along said r/w for a distance of 3705 feet to where said road crosses said track of said company; thence 40 feet in width along the Northeast-erly side of said r/3; running Northwesterly to the North line of Sec. 13, Twp. 36 N.R. 39 E. Mt. D.

Total acreage of Parcel No. 2: 3197.69 acres.

Parcel No. 3

Twp. 35 N.R. 39 E.

Section 14: S $\frac{1}{2}$ SE $\frac{1}{4}$.

Section 16: S $\frac{1}{2}$ SE $\frac{1}{4}$; S $\frac{1}{2}$ SW $\frac{1}{4}$.

Section 20: N $\frac{1}{2}$ NE $\frac{1}{4}$.

Section 22: NW $\frac{1}{4}$ NE $\frac{1}{4}$; N. 2 NW $\frac{1}{4}$; W $\frac{1}{2}$ SE $\frac{1}{4}$; SE $\frac{1}{4}$ SW $\frac{1}{4}$.

Section 28: NE $\frac{1}{4}$ NW $\frac{1}{4}$; SW $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$ SW $\frac{1}{4}$.

Twp. 35 N. R. 40 E:

Section 7: N $\frac{1}{2}$ SW $\frac{1}{4}$. [53]

EXHIBIT "D"

Sec. 2224. "One who gains a thing by * * * the violation of a trust is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

Sec. 2228. "Trustee's obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

Sec. 2229. "Trustee not to use property for his own profit. A trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust, in any manner."

Sec. 2230. "Certain transactions forbidden. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision and without the use of influence on the part of the trustee permits him to do so;"

Sec. 2231. "Trustee's influence not to be used for his advantage. A trustee may not use the influence

which his position gives to him to obtain any advantage from his beneficiary.”

Sec. 2232. “Trustee not to assume a trust adverse to interest of beneficiary. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.”

Sec. 2233. “To disclose adverse interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interests of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.”

Sec. 2234. “Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust.”

Sec. 2235. “Presumption against trustee. All transactions between a trustee and his beneficiary denying the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advance from his beneficiary, are presumed to be interested into by the latter without sufficient consideration, and under undue influence.”

Sec. 2237. “Measure of liability for breach of trust. A trustee who uses or disposes of the trust property contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has

disposed thereof, to replace it, with its fruits, or to account for the proceeds with interest." [54]

[Endorsed]: Filed October 21, 1954.

[Title of District Court and Cause.]

ANSWER OF DIAMOND-S RANCH CO. TO
FIRST AMENDED COMPLAINT

Now comes the Defendant Diamond-S Ranch Co., a Nevada Corporation, and answering the First Amended Complaint on file herein admits, denies and alleges as follows:

Answering the allegations contained in the First Count of said First Amended Complaint, this Defendant admits, denies and alleges as follows:

I.

Answering Paragraph I of said First Count, this Defendant [55] has no information or belief sufficient to enable it to answer said allegations, and basing its denial upon such lack of information or belief, denies each and every, all and singular, the allegations therein contained; and in this regard, this Defendant denies that said Plaintiffs have any capacity or right to bring or maintain this suit;

II.

Answering the allegations set forth in Paragraph II of said First Count, this Defendant admits that the Defendants A. E. Corbari and Marie Corbari

are husband and wife and are citizens of the State of Nevada; admits that the Defendants Sam Wah-you, Forrest E. Macomber, K. R. Nutting, Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon, Herbert Jang and D. W. Zignego are all of them citizens and residents of the State of California; admits that Diamond-S Ranch Co. is and at all times herein mentioned in said First Amended Complaint was a corporation organized and existing under the laws of the State of Nevada, and has its principal office in Reno, Nevada; and, except as expressly herein admitted, denies each and every, all and singular, the allegations therein contained;

III.

This Defendant has no information or belief sufficient to enable it to answer the allegations contained in Paragraph IV of said First Count; and basing its denial upon such lack of information and belief, denies each and every, all and singular, the allegations therein contained;

IV.

This Defendant has no information or belief sufficient to enable it to answer the allegations contained in Paragraph V of said First Count, and basing its denial upon such lack of information and belief, denies each and every, all and singular, the allegations therein contained; [56]

V.

This Defendant has no information or belief suf-

ficient to enable it to answer the allegations contained in Paragraph VI of said First Count, and basing its denial upon such lack of information and belief, denies each and every, all and singular, the allegations therein contained;

Answering the allegations contained in the Second Count set forth in said First Amended Complaint, this Defendant admits, denies and alleges as follows:

I.

This Defendant re-alleges herein, the same as if herein again fully set forth, this Defendant's answers to Paragraphs I, II, IV, V and VI of the First Count set forth in Plaintiff's First Amended Complaint which are incorporated by reference in Paragraph I of the Second Count of said First Amended Complaint;

II.

Answering the allegations contained in Paragraph II of said Second Count, this Defendant alleges that the Diamond-S Ranch Co. is a corporation organized and existing under the laws of the State of Nevada with its principal office at Reno, Nevada, and is a citizen of the State of Nevada; alleges that the said Diamond-S Ranch Co. failed to file with the Secretary of State of Nevada a list of the Officers and Directors and Designation of its Resident Agent in this State for the period commencing July 1, 1951, as required by Section 1, Chapter 180, of the General Corporation Laws of 1925, as amended, (Paragraph 1804 of the Domestic and Foreign Corporation Laws of the State of

Nevada), and that by reason thereof it forfeited its right to carry on business in the State of Nevada, but that on the 11th day of September, 1952, said Corporation cured said default as provided in Section 6 of Chapter 180, of the General Corporation Laws of 1925, as amended (Paragraph 1809 of the Domestic [57] and Foreign Corporation Laws of the State of Nevada), whereupon its Charter was reinstated and said reinstatement expressly authorized said Corporation to transact business in the same manner as if the filing fee or the license tax had been paid when due, and that by reason of said reinstatement, said Corporation was restored to all of its powers, property, etc., the same as if no forfeiture had occurred, and that on said 11th day of September, 1952, the Secretary of State of the State of Nevada issued his Certificate of Reinstatement as provided in Section 6 of Chapter 180, of the General Corporation Laws of 1925, as amended (Paragraph 1809 of the Domestic and Foreign Corporation Laws of the State of Nevada); this Defendant further alleges that on September 7, 1950, said Diamond-S Ranch Co. filed a Certificate of Dissolution in the Office of the Secretary of State of the State of Nevada and that on December 7, 1951, said Corporation, having elected to renew and revive said Corporate Charter, filed in the Office of the Secretary of State of Nevada its Certificate of Renewal and Revival of its Corporate Charter, and said Certificate provided that said renewal or revival of the Corporate Charter of said Corporation was to be effective September 7, 1950,

in accordance with Section 93 (3), Chapter 177, General Corporation Law of 1925, as amended (Chapter 1692 of the Domestic and Foreign Corporation Laws of the State of Nevada), and that by reason of said revival or renewal, said Diamond-S Ranch Co. is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada and authorized to transact the business of said Corporation; that except as expressly herein admitted, this Defendant denies each and every, all and singular, the allegations contained in said Paragraph II of said Second Count;

III.

Answering the allegations contained in Paragraph III of said Second Count, this Defendant admits that on September 7, 1950, [58] the Defendants A. E. Corbari, Sam Wahyou, K. R. Nutting and Thomas G. Lee were the duly elected and qualified Directors of said Corporation and alleges that by reason of the reinstatement and revival of said Corporation as hereinabove set forth, said Defendants continued to be the Directors of said Corporation until their successors were elected, and except as expressly herein admitted, denies each and every, all and singular, the allegations contained in said Paragraph III of said Second Count;

IV.

Answering the allegations contained in Paragraph IV of said Second Count, this Defendant denies that the stockholders of said Corporation became

owners of the property therein mentioned or any other property of Diamond-S Ranch Co. or at all;

V.

Admits the allegations contained in Paragraph V of said Second Count except that in regard to the Defendant A. E. Corbari this Defendant alleges that his shares of said stock had long previously been pledged to the Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, to secure a loan from said Bank, and that on said date said Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, actually had possession of said shares of stock as pledgeholder and that all of said facts were well known to Plaintiffs herein at that time and were well known to the Plaintiffs herein at the time said Plaintiffs had said purported Assignment executed, which purported assignment is attached to the First Amended Complaint marked Exhibit "B"; that said assignment is of no force and effect whatsoever and at the time the same was executed Plaintiffs well knew that the Defendant A. E. Corbari had pledged his stock to the Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, and said Plaintiffs were given an opportunity to redeem said stock but refused to do so; [59]

VI.

Answering the allegations contained in Paragraph VI of said Second Count, this Defendant denies the allegations therein contained to the effect

that the Defendants Wahyou and Macomber had notice and knowledge of said agreement prior to their actions complained of therein; this Defendant has no information or belief sufficient to enable it to answer the balance of the allegations contained in said Paragraph VI of said Second Count, and basing its denial upon such lack of information or belief, denies each and every, all and singular, the balance of said allegations;

VII.

Answering the allegations contained in Paragraph VII of said Second Count, this Defendant alleges that said Diamond-S Ranch Co. was revived and reinstated as hereinabove set forth, and further answering said Paragraph VII denies each and every, all and singular, the allegations contained therein;

VIII.

Answering the allegations contained in Paragraph VIII of said Second Count, this Defendant refers to and incorporates herein the same as if herein again fully set forth, its allegations and answers with respect to Paragraph II of the Second Count herein, and except as expressly therein admitted, denies each and every, all and singular, the allegations contained in said Paragraph VIII;

IX.

Denies each and every, all and singular, the allegations contained in Paragraph IX of said Second Count;

Answering the allegations contained in the Third Count set forth in said First Amended Complaint, this Defendant admits, denies and alleges as follows: [60]

I.

This Defendant re-alleges herein, the same as if herein again fully set forth, this Defendant's answers to the allegations contained in the First and Second Counts of said First Amended Complaint which are incorporated by reference in Paragraph I of the Third Count of said First Amended Complaint;

II.

Answering the allegations contained in Paragraph II of said Third Count, this Defendant alleges that on or about the 17th day of October, 1950, the Bank of America N. T. & S. A., Hunter Square Branch, at Stockton, California, assigned all of its right, title and interest in and to said promissory note owing by Corbari, together with the security, consisting of a pledge of 310 Shares of the Capital Stock of Diamond-S Ranch Co. owned by Corbari, unto Sam Wahyou, who paid said Bank the sum of \$5,000.00 plus interest therefor; that the Plaintiffs herein were informed by Corbari that all of his stock in Diamond-S Ranch Co. had been pledged to the Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, and that he could not transfer or assign said stock unto Plaintiffs, and Plaintiffs had full knowledge of all of said facts prior to March 25, 1950, and on and prior

to October 31, 1950; that the moneys due on said promissory note were not paid to Sam Wahyou when the same became due, and by reason thereof the said Sam Wahyou caused said stock to be sold under the terms of said pledge agreement and pursuant to the laws of the State of California relating to sales under pledges, and on May 21, 1951, became the absolute owner of said 310 shares of stock which formerly belonged to the Defendant Corbari, and said Sam Wahyou is and ever since has been the owner thereof; that Plaintiffs herein at all times knew that Corbari's stock was pledged to the Bank of America for a sum in excess of \$5,000.00 and that they could not obtain a pledge or a lien upon said stock of Corbari without paying off the Bank of [61] America, and on March 25, 1950, said Plaintiffs wrote a letter to Corbari declining to pay off said Bank of America; that this Defendant is and at all times herein mentioned was a bona fide corporation, organized under the laws of the State of Nevada, and the only interest that Corbari had therein was as a stockholder owning 310 shares subject to the pledges as aforesaid; that said Plaintiffs, with full knowledge of the said facts, prepared a so-called Assignment of Corbari's interest in said corporation, knowing that said Assignment was of no force or effect whatever and knowing that there was already a pledge of said stock to said Bank of America; that except as expressly herein admitted, this Defendant denies each and every, all and singular, the allegations contained in Paragraph II of said Third Count;

III.

Denies each and every, all and singular, the allegations contained in Paragraph III of said Third Count;

Answering the allegations contained in the Fourth Count set forth in said First Amended Complaint, this Defendant admits, denies and alleges as follows:

I.

This Defendant re-alleges herein, the same as if herein again fully set forth, this Defendant's answers to the allegations contained in the First, Second and Third Counts of said First Amended Complaint which are incorporated by reference in Paragraph I of the Fourth Count of said First Amended Complaint;

II.

This Defendant has no information or belief sufficient to enable it to answer the allegations contained in Paragraph II of said Fourth Count, and basing its denial upon such lack of information and belief, denies each and every, all and singular, the allegations therein contained; [62]

III.

Denies each and every, all and singular, the allegations contained in Paragraph III of said Fourth Count, and in this connection this Defendant alleges that said Paragraph III does not set forth any facts which show any connection between the Defendant A. E. Corbari and the Defend-

ants Wahyou and Macomber or any facts which give rise to any conspiracy or fraud.

Wherefore, this Defendant prays that Plaintiffs take nothing by virtue of their First Amended Complaint, and that this Defendant have and recover from said Plaintiffs its costs of Court, together with a reasonable attorney fee.

/s/ JOHN DAVIDSON,
Attorney for Defendant Diamond-S Ranch Co., a
Nevada corporation.

Duly Verified. [63]

[Endorsed]: Filed November 3, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, A. E. CORBARI
AND MARIE CORBARI, TO PLAINTIFFS'
FIRST AMENDED COMPLAINT

Come Now the defendants, A. E. Corbari and Marie Corbari, by and through their Attorney, John S. Halley, and for answer and defense to plaintiffs' First Amended Complaint, on file herein, admit, deny and aver as follows:

First Defense

That said First Amended Complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

I.

Answering the allegations contained in Paragraph I of the first count of said complaint, the said defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, and specifically deny that said plaintiffs have any [64] capacity or right to bring or maintain this action.

II.

Answering the allegations contained in Paragraph II of the first count of said complaint, the said defendants admit that they are husband and wife, and are residents and citizens of the State of Nevada, and that Diamond-S Ranch Co. is a corporation organized under the laws of the State of Nevada, with its principal office therein, and is a citizen of the State of Nevada; that except as expressly herein admitted, the defendants deny the remaining allegations contained in said Paragraph for the reason that they are without knowledge or information sufficient to form a belief as to the truth of said remaining allegations.

III.

Answering the allegations contained in Paragraph IV of the first count of said complaint, these defendants admit that on or about the 31st day of December, 1948, they made, executed and delivered to John W. Smeed the promissory note herein referred to, and allege that they are without knowl-

edge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph.

IV.

Answering the allegations contained in Paragraph V and VI of the first count of said complaint, these defendants deny they owe to plaintiffs the amount of said note, plus interest, less Seven Hundred Fifty Dollars (\$750.00) paid on the principal thereof on or about November 22, 1950, and allege that they have paid thereon the further sum of One Thousand Dollars (\$1,000.00), plus interest, and allege that they have paid the plaintiffs on account of said note the total sum of One Thousand Seven Hundred Fifty Dollars (\$1,750.00), plus interest. [65]

Answering the Allegations Contained in the Second Count of Said Complaint, These Defendants Admit, Deny and Aver as follows:

I.

Answering the allegations contained in Paragraph I of the second count of said complaint, these defendants reallege at this place as if set forth in haec verba their answers to Paragraphs I, II, III, IV, V and VI of the first count of said complaint.

II.

Answering the allegations contained in Paragraph V of the second count of said complaint, these defendants admit the allegations therein contained,

and in this connection allege that the shares of stock owned by the defendant, A. E. Corbari, and registered in his name on the books of said corporation, had, prior to the 22nd day of February, 1950, been pledged by him to the Bank of America N. T. & S. A., Stockton, California, to secure a loan previously made by him from said bank.

III.

Answering the allegations contained in Paragraph VI of the second count of said complaint, these defendants admit that the defendant, A. E. Corbari, executed said assignment, and in this connection alleges that prior to said date and prior to February 22, 1950, the defendant, A. E. Corbari, informed plaintiffs that he had delivered possession of his said shares of stock of said corporation to the Bank of America N. T. & S. A., Stockton, California, as a pledge to secure a loan obtained by him from said bank, and offered to the plaintiffs the opportunity to redeem said stock, which said offer the plaintiffs rejected.

IV.

Answering the allegations contained in Paragraph VII [66] of the second count of the said complaint, these defendants deny each and every allegation therein contained, and in this connection allege that said Diamond-S Ranch Co. was revived and reinstated on the 7th day of December, 1951, in accordance with the corporation laws of the State of Nevada.

V.

Answering the allegations contained in Paragraph VIII of the second count of said complaint, these defendants deny that any of their acts and conduct therein alleged was in violation of any duty, was unlawful, was false, was fraudulent, and in this connection allege that all of the acts of the defendant, A. E. Corbari, in connection with said Certificate of Revival were lawful and proper.

VI.

Answering the allegations contained in Paragraph IX of the second count of said complaint, the defendants deny each and every, all and singular, said allegations.

Answering the Allegations Contained in the Third Count of Said Complaint, These Defendants **Admit, Deny and Aver** as follows:

I.

Answering the allegations contained in Paragraph I of the Third Count of said complaint, these defendants reallege as if set forth at this place in haec verba their answers to all matters contained in the first and second count of said complaint.

II.

Answering the allegations contained in Paragraphs II and III of the third count of said complaint, these defendants allege that they are without knowledge or information sufficient to form a belief

as to the truth of the allegations contained in [67] said Paragraphs.

Answering the Allegations Contained in the Fourth Count of Said Complaint, These Defendants Admit, Deny and Aver as follows:

I.

Answering the allegations contained in Paragraph I of the fourth count of said complaint, these defendants reallege as if set forth at this place in haec verba their answers to all matters contained in the first, second and third counts of said complaint.

II.

Answering the allegations contained in Paragraph II of the fourth count of said complaint, these defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph.

III.

Answering the allegations contained in Paragraph III, of the fourth count of said complaint, the defendants deny each and every, all and singular, the allegations contained in said Paragraph.

Third Defense

That the alleged second count of said complaint fails to state a claim against defendants upon which relief can be granted.

Fourth Defense

That the alleged third count of said complaint fails to state a claim against defendants upon which relief can be granted.

Fifth Defense

That the alleged fourth count of the said complaint fails to state a claim against defendants upon which relief can be granted. [68]

Wherefore, these defendants pray that plaintiffs take nothing by reason of their complaint, that the same be dismissed, and that they have their costs and expenditures.

/s/ JOHN S. HALLEY,
Attorney for Defendants, A. E. Corbari and Marie
Corbari.

Duly Verified.

Acknowledgment of Service attached. [69]

[Endorsed]: Filed Nov. 12, 1954.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS FORREST E.
MACOMBER, THOMAS G. LEE, TOY
QUONG, JOE SIN, YIP K. TOON, HER-
BERT JANG and D. W. ZIGNEGO TO
FIRST AMENDED COMPLAINT

Now come the Defendants Forrest E. Macomber,
Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon,

Herbert Jang and D. W. Zignego and answering the First Amended Complaint on file herein, admit, deny and allege as follows:

I.

Defendants Forrest E. Macomber and D. W. Zignego disclaim [70] any right, title or interest whatsoever in and to the property of Diamond-S Ranch Co. or to any of the Capital Stock of Diamond-S Ranch Co.

II.

The Defendants, Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon and Herbert Jang allege as follows, to-wit: That on August 30, 1953, said Defendants did sell, transfer, assign and set over unto one Frank H. Hogue all of their Shares of Capital Stock in Diamond-S Ranch Co., and that said Defendants, therefore, disclaim any interest in and to the property of Diamond-S Ranch Co. or to any of the Capital Stock of Diamond-S Ranch Co.

III.

All of these answering Defendants adopt by reference all of the allegations and matters contained in the Answer of the Defendant Diamond-S Ranch Co. to the First Amended Complaint on file herein except the answer with respect to Paragraph IX of the Second Count or Cause of Action set forth in said First Amended Complaint and Paragraph III of the Third Count or Cause of Action set forth in said First Amended Complaint, which paragraphs were ordered stricken by this Court.

IV.

These Defendants allege that they are not proper parties to this proceeding for the reason that the above-entitled action is one in personam and not in rem or quasi in rem, and that the Court has no jurisdiction over the persons of these Defendants for the reason that they are not residents of the State of Nevada nor have they been served therein; that they are all residents of the State of California and that they have not voluntarily appeared in this action but have been compelled to appear by Order of Court.

V.

That the First Amended Complaint and each and every cause [71] of action set forth therein, fails to state a claim against these Defendants or any of them upon which relief can be granted;

VI.

That neither said First Amended Complaint nor any Count or Cause of Action set forth therein states any cause of action, in this, that this proceeding is not one to enforce a legal or equitable lien upon or claim to the title to real or personal property or to remove some encumbrance, lien or cloud upon the title to such property, but is one to create for the first time a claim to the property as the effect of the proceeding itself.

Wherefore, these answering Defendants pray that Plaintiffs take nothing against these Defendants and that they be dismissed hence with their costs of

Court herein incurred, together with a reasonable attorney fee.

/s/ JOHN DAVIDSON,
Attorney for Defendants Forrest E. Macomber,
Thomas G. Lee, Toy Quong, Joe Sin, Yip K.
Toon, Herbert Jang and D. W. Zignego.

Duly Verified. [72]

[Endorsed]: Filed January 5, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION

Defendant Diamond-S Ranch Co., a Nevada Corporation, requests the Plaintiffs above-named to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements is true:

1. That Diamond-S Ranch Co. is a Nevada Corporation, organized and existing under the laws of the State of Nevada since the 17th day of December, 1945. [73]

2. That the Defendant A. E. Corbari, hereinafter called Corbari, was the owner of 310 shares of the Capital Stock of Diamond-S Ranch Co. on and prior to July 10, 1950, out of a total of 1572 $\frac{1}{2}$ Shares outstanding as of that date.

3. That prior to July 10, 1950, Corbari was in-

debted to C-Arrow Cattle Company of Stockton, California, which indebtedness was evidenced by a promissory note dated November 19, 1947.

4. That said promissory note was assigned by C-Arrow Cattle Company unto Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California.

5. That as security for the payment of said note, said Corbari did execute unto said Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, a pledge of his 310 shares of Capital Stock of Diamond-S Ranch Co.

6. That on or about July 10, 1950, a renewal note in the sum of \$6,000.00 was executed by Corbari, as maker, unto said Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, which note was likewise secured by a pledge of Corbari's said stock in Diamond-S Ranch Co.

7. That on or about September 18, 1950, Corbari executed another pledge agreement to Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, for the benefit of said Bank and, likewise, to secure other indebtedness owing by Corbari to one D. W. Zignego and one Forrest E. Macomber.

8. That on or about October 17, 1950, Corbari paid said Bank of America the sum of \$1,000.00, leaving a balance of \$5,000.00 plus interest due to said Bank by Corbari as of October 17, 1950.

9. That on or about said 17th day of October, 1950, the Bank of America, N. T. & S. A., Hunter

Square Branch, at Stockton, California, assigned all of its right, title and interest in and to said promissory note owing by Corbari, together with the security, consisting of a pledge of 310 Shares of the Capital Stock of [74] Diamond-S Ranch Co. owned by Corbari, unto Sam Wahyou, who paid said Bank the sum of \$5,000.00 plus interest therefor.

10. That Plaintiff herein was informed by Corbari that all of his stock in Diamond-S Ranch Co. had been pledged to Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, and that he could not transfer or assign said stock unto Plaintiff and Plaintiff had full knowledge of all of said facts prior to March 25, 1950, and on and prior to October 31, 1950.

11. That the moneys due on said promissory note were not paid to Sam Wahyou when the same became due, and by reason thereof the said Sam Wahyou caused said stock to be sold under the terms of said pledge agreement and pursuant to the laws of the State of California relating to sales under pledges;

12. That on May 21, 1951, the said Sam Wahyou became the absolute owner of said 310 Shares of stock which formerly belonged to the Defendant Corbari, and said Sam Wahyou is and ever since has been the owner thereof.

13. That Plaintiff herein at all times knew that Corbari's stock was pledged to the Bank of America for a sum in excess of \$5,000.00 and that they could not obtain a pledge or a lien upon said stock of Corbari without paying off the Bank of America.

14. That on March 25, 1950, said Plaintiff wrote a letter to Corbari declining to pay off said Bank of America.

15. That this Defendant is and at all times herein mentioned was a bona fide corporation, organized under the laws of the State of Nevada, and the only interest that Corbari had therein was as a stockholder owning 310 shares subject to the pledges as aforesaid.

16. That with full knowledge of the said facts, said Plaintiff prepared a so-called Assignment of Corbari's interest in said corporation, knowing that said Assignment was of no force or effect whatever and knowing that there was already a pledge of said [75] stock to said Bank of America.

17. Although on September 7, 1950, Diamond-S Ranch Co. filed a Certificate of Election to Dissolve, it elected to rescind the same and filed its Certificate of Revival on December 7, 1951, electing to reinstate said Corporation, and caused said corporation to be renewed and revived as of September 7, 1950, in accordance with Section 93(3), Chapter 177, General Corporation Law of 1925, as amended, of the Statutes of Nevada.

Dated October 4, 1954.

/s/ JOHN DAVIDSON,

Attorney for Defendant Diamond-S Ranch Co., a
Nevada Corporation.

Acknowledgment of Service attached. [76]

[Endorsed]: Filed October 5, 1954.

[Title of District Court and Cause.]

VERIFIED RESPONSE TO REQUEST FOR ADMISSION

Plaintiffs submit the following response to the request of defendant Diamond-S Ranch Co.:

I.

Admit that the Diamond-S Ranch Co. was a Nevada corporation from the 17th day of December, 1948, until the filing of the certificate of dissolution of said corporation on the 7th day of September, 1950. For further answer to this admission see the answer to Request No. 17.

II.

Admit that defendant Corbari was the owner of 310 shares of the capital stock of Diamond-S Ranch Co. out of a total of 1572.5 shares as of September 7, 1950.

III.

Plaintiffs have no knowledge that Corbari was indebted to the C-Arrow Cattle Company of Stockton, California, as evidenced by promissory note dated November 19, 1947.

IV.

These plaintiffs have no knowledge that the promissory note, if any, was assigned by C-Arrow Cattle Company to Bank of [77] America and N. T. & S. A., Hunters Square Branch, Stockton, California.

V.

Admit.

VI.

Plaintiffs admit that on July 10, 1950 defendants Corbari and the C-Arrow Cattle Company executed a demand note in the amount of \$6,000.00, which said note is contained as Exhibit 1 to the deposition of Sam Wahyou and Forrest E. Macomber on file in this court; admit that there was a general pledge executed by Corbari and others to the Bank of America dated the 4th day of January, 1949 and further admit that there was another pledge agreement dated September 18, 1950, but deny any knowledge of any pledge agreement other than the said two documents, copies of which were both furnished to plaintiffs by defendant Macomber.

VII.

Admit the execution of a pledge agreement of September 18, 1950 by defendant Corbari.

VIII.

Admit.

IX.

Admit that on the 17th day of October, 1950 the Bank of America by document attached to the deposition of Wahyou and Macomber, as Exhibit 2, assigned its interest in the note, Exhibit 1, to the deposition of Wahyou and Macomber, to Wahyou.

X.

Plaintiffs admit that Corbari informed plaintiffs'

decedent that all of his stock in the Diamond-S Ranch Company had been pledged to the Bank of America.

XI.

With reference to Admission XI plaintiffs deny that the facts are other than as set forth in Paragraph II of the Third Count of plaintiffs' amended complaint. [78]

XII.

Deny.

XIII.

Plaintiffs make reference to the admission concerning the pledge of the stock contained in the answer to Admission X above.

XIV.

Admit.

XV.

Deny.

XVI.

Plaintiffs deny that the facts are other than as set forth in their amended complaint concerning the assignment which is attached thereto as an exhibit.

XVII.

Plaintiffs deny that the law is as concluded by defendant Diamond-S Ranch Co. and specifically deny that there is in the Nevada law any right in the defendants to "elect to rescind" dissolution

action theretofore ordered under the seal of the Secretary of State of the State of Nevada.

SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,
PIKE & McLAUGHLIN,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs [79]

Duly Verified. [80]

[Endorsed]: Filed October 12, 1954.

[Title of District Court and Cause.]

MOTION TO QUASH SERVICE OF SUM-
MONS; MOTION TO DISMISS; AND MO-
TION TO STRIKE

Now come the Defendants Sam Wahyou, Forrest E. Macomber, K. R. Nutting, Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon, Herbert Jang and D. W. Zignego, and appearing specially for that purpose, move the Court as follows: [81]

1. To quash the service of Summons made outside of the State of Nevada upon all of said Defendants, upon the ground that the above-entitled action is one in personam and not in rem or quasi in rem and that the Court has no jurisdiction over the persons of these Defendant; and

2. To dismiss the action because the Complaint fails to state a claim against these Defendant, and

each of them, upon which relief can be granted; and

3. To strike from said Complaint the following:

All of Paragraph IX of the Second Count;

All of Paragraphs II and III of the Third Count;

All of Paragraph III of the Fourth Count;

upon the ground that said allegations are conclusions of law, and are redundant and immaterial.

Dated: November 23, 1954.

/s/ JOHN DAVIDSON,

Attorney for Said Defendants

Acknowledgment of Service attached. [82]

[Endorsed]: Filed November 24, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO QUASH
SERVICE; DENYING MOTION TO DIS-
MISS; AND GRANTING IN PART AND
DENYING IN PART MOTION TO STRIKE

The defendants' (1) Motion to Quash Service, (2) Motion to Dismiss, and (3) Motion to Strike came on this 15th day of December, 1954, for hearing, Miles N. Pike and Laurence N. Smith appearing for the plaintiffs, and John Davidson appearing for the defendants.

The motions being argued by counsel and presented submitted to the Court for determination, it is

Ordered that the motion to quash service of

summons [86] be and the same is hereby denied. It is further

Ordered, that the motion to dismiss be and the same is hereby denied. It is further

Ordered, that the motion to strike is granted as to Paragraph IX of the Second Count, and as to Paragraph III of the Third Count; said motion is denied as to Paragraph II of the Third Count and Paragraph III of the Fourth Count.

Dated: December 15th, 1954.

/s/ JOHN R. ROSS,

United States District Judge [87]

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

FACTUAL STATEMENT OF THE DEFENSE OF DEFENDANT DIAMOND-S RANCH CO.

The facts in this case, so far as material here and to the knowledge and belief of the Defendant Diamond-S Ranch Co., are as follows:

Diamond-S Ranch Co. is a Nevada Corporation, organized and existing under the laws of the State of Nevada since the 17th day of December, 1945.

The Defendant A. E. Corbari, hereinafter called Corbari, was the owner of 310 shares of the Capital Stock of Diamond-S Ranch Co. on and prior to July 10, 1950, out of a total of 1572½ Shares outstanding as of that date. [88]

Prior to July 10, 1950, Corbari was indebted to C-Arrow Cattle Company of Stockton, California, which indebtedness was evidenced by a promissory note dated November 19, 1947, and that said promissory note was assigned by C-Arrow Cattle Company unto Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, and that as security for the payment of said note, said Corbari did execute unto said Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, a pledge of his 310 shares of Capital Stock of Diamond-S Ranch Co.

On or about July 10, 1950, a renewal note in the sum of \$6,000.00 was executed by Corbari, as maker, unto said Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, which note was likewise secured by a pledge of Corbari's said stock in Diamond-S Ranch Co., and that on or about September 18, 1950, Corbari executed another pledge agreement to Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, for the benefit of said Bank and, likewise, to secure other indebtedness owing by Corbari to one D. W. Zignego and one Forrest E. Macomber. On or about October 17, 1950, Corbari paid said Bank of America the sum of \$1,000.00, leaving a balance of \$5,000.00 plus interest due to said Bank by Corbari as of October 17, 1950.

On or about said 17th day of October, 1950, the Bank of America N. T. & S. A., Hunter Square Branch, at Stockton, California, assigned all of its

right, title and interest in and to said promissory note owing by Corbari, together with the security, consisting of a pledge of 310 Shares of the Capital Stock of Diamond-S Ranch Co. owned by Corbari, unto Sam Wahyou, who paid said Bank the sum of \$5,000.00 plus interest therefor.

Plaintiff herein was informed by Corbari that all of his stock in Diamond-S Ranch Co. had been pledged to Bank of America N. T. & S. A., Hunter Square Branch, Stockton, California, and that he could not transfer or assign said stock unto Plaintiff and Plaintiff had full knowledge of all of said facts prior to [89] March 25, 1950, and on and prior to October 31, 1950.

The moneys due on said promissory note were not paid to Sam Wahyou when the same became due, and by reason thereof the said Sam Wahyou caused said stock to be sold under the terms of said pledge agreement and pursuant to the laws of the State of California relating to sales under pledged, and on May 21, 1951, became the absolute owner of said 310 shares of stock which formerly belonged to the Defendant Corbari, and said Sam Wahyou is and ever since has been the owner thereof.

Plaintiff herein at all times knew that Corbari's stock was pledged to the Bank of America for a sum in excess of \$5,000.00 and that they could not obtain a pledge or a lien upon said stock of Corbari without paying off the Bank of America, and on March 25, 1950, said Plaintiff wrote a letter to Corbari declining to pay off said Bank of America.

This Defendant is and at all times herein mentioned was a bona fide corporation, organized under the laws of the State of Nevada, and the only interest that Corbari had therein was as a stockholder owning 310 shares subject to the pledges as aforesaid. With full knowledge of the said facts, said Plaintiff prepared a so-called Assignment of Corbari's interest in said corporation, knowing that said Assignment was of no force or effect whatever and knowing that there was already a pledge of said stock to said Bank of America.

Although on September 7, 1950, Diamond-S Ranch Co. filed a Certificate of Election to Dissolve, it elected to rescind the same and filed its Certificate of Revival on December 7, 1951, electing to reinstate said corporation, and caused said corporation to be renewed and revived as of September 7, 1950, in accordance with Section 93(3), Chapter 177, General Corporation Law of 1925, as amended, of the Statutes of Nevada.

Plaintiff's case then boils down to this: Plaintiff [90] undoubtedly has a good cause of action against the Defendants Corbari on a promissory note. Plaintiffs had an opportunity to obtain some security for that promissory note, were unwilling to pay the Bank of America off in order to do so, prepared a document that has no legal effect and were content to rely upon such a document, in the meantime the assignee of the Bank of America foreclosed its lien on the stock and obtained Corbari's stock, so that Corbari has no more stock, and neither Dia-

mond-S Ranch Co. nor any other Defendants herein are indebted to or liable to Plaintiffs in any way or under any theory.

Respectfully submitted,

/s/ JOHN DAVIDSON,

Attorney for Defendant Diamond-S Ranch Co., a Nevada Corporation.

Acknowledgment of Service attached. [91]

[Endorsed]: Filed October 5, 1954.

[Title of District Court and Cause.]

DEPOSITION OF W. W. LORD

Be it remembered that, pursuant to stipulation of counsel in the above-entitled matter, the deposition of W. W. Lord, a plaintiff herein, and a witness produced for and on behalf of the defendants, was taken before me, Leota Raiford, a Notary Public in and for the County of Washoe, State of Nevada, duly commissioned, qualified and acting, beginning at the hour of 12:35 o'clock p.m. on Friday, the 17th day of October, 1952, at the law offices of John S. Halley, Esquire, First National Bank Building, in the City of Reno, County of Washoe, State of Nevada.

Laurence N. Smith, Esquire, representing Messrs. Smith & Ewing, and George Greenfield, Esquire, representing Messrs. Carver, McClenahan & Greenfield, appearing as counsel on behalf of the plaintiffs; and

John S. Halley, Esquire, appeared as counsel on behalf of defendant, A. E. Corbari; and

John Davidson, Esquire, appeared as counsel on behalf of defendant, Diamond-S Ranch Company, a corporation.

The said witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the testimony he was about to give in the above-entitled matter, whereupon said witness was examined upon oral interrogatories propounded by counsel, and made answers thereto, under oath, as hereinafter contained, and the following proceedings were had: W. W. Lord, a plaintiff herein, of lawful age, produced as a witness by the defendants herein, being first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Examination

By Mr. Davidson:

Q. State your name, please.

A. W. W. Lord.

Q. You are one of the trustees of the Smeed Estate? A. Yes.

Q. One of the plaintiffs in the action Miller vs. Corbari et al? A. Yes.

Q. You have prepared an assignment dated the 31st day of October, 1950, signed by Mr. and Mrs. Corbari, is that true? A. No.

Q. You did not prepare it?

A. I did not prepare it.

Q. You had it prepared?

A. Yes, I had it prepared.

Q. Who prepared it?

A. Attorney Laurence Smith.

Q. You had Mr. Smith who is attorney for the estate prepare it? A. Yes.

Q. You had him prepare it at your request and suggestion?

A. Well, it was Archie's request.

Q. But, you instructed Mr. Smith to prepare it?

A. Mr. Corbari was in Caldwell and met with Mr. Smith and myself and discussed the assignment.

Q. At the time this assignment was drawn, you knew of your own personal knowledge that the Bank of America in Stockton had a lien on the Corbari stock? A. No.

Q. You did not? A. No.

Q. You had no knowledge of it at all?

A. He represented to us that day that he had paid it.

Q. The day he signed the assignment, he represented to you that he had paid it?

A. The day we met and instructed to prepare the assignment.

Q. Prior to that, you knew the bank had it?

A. Yes.

Q. But, when the assignment was drawn, you didn't know that the bank had a prior claim on this stock?

A. When the assignment was prepared, my understanding was that the bank debt had been paid by Mr. Corbari.

Q. How did you reach that understanding?

A. Well, he said that he had paid it.

Q. Mr. Corbari told you that he had paid it?

A. Yes, when he instructed us to prepare the assignment, we asked him what he had done about the stock of the corporation which had been dissolved, and he said he had paid the bank.

Q. Corbari told you that he had paid the bank?

A. Yes, sir.

Q. Then at that time or at any time later, you didn't know that the bank had a lien on this stock?

A. Not after that time, no, sir.

Q. Then after October 31, you had no knowledge whatever that the bank still had a lien on this stock?

A. No, sir.

Mr. Davidson: That is all.

Mr. Greenfield: No questions.

Mr. Halley: Wait a minute. I'd like to ask a question here.

Q. Where did you learn that the corporation had been dissolved or from whom did you learn the corporation had been dissolved?

A. Mr. Corbari.

Q. When did you learn it from him?

A. Well, about I think some time in September of 1950.

Q. Shortly before this assignment was prepared?

A. Yes, Mr. Corbari discussed with me at one time about the anticipated sale they wanted to make of the ranch.

Q. Did he at that time, represent that the bank had been paid for the stock?

A. Not until we had the meeting in Caldwell.

Q. What was the date of that meeting? Was it the date this assignment was signed?

A. Not when it was signed, probably when it was dated. Mr. Corbari signed the assignment in Stockton.

Q. The assignment is dated the 31st day of October, and it is acknowledged on the same date, 1950, in Stockton.

A. It was a short time before that that Mr. Corbari was in Caldwell. I don't remember exactly the date.

Q. Prior to that time, you knew his stock in this company had been pledged to the Stockton Branch of the Bank of America?

A. The year before, I knew it had been pledged there.

Q. He told you at that particular time the bank had been paid off, the stock redeemed?

A. Yes.

Q. Did you demand of him at that time that he deposit with you the stock? A. No.

Q. This assignment, as I understand, Mr. Lord, was given to secure a debt owing your Trust?

A. That is right.

Q. It wasn't for money advanced at that particular time, but it was to secure what we call an antecedent debt, is that right?

A. A note, yes.

Q. Given to secure the note of December 31, 1948? A. Yes.

Q. Was that note given for a debt that was on the books of your company?

A. That note was given as a renewal of another note that was given for the debt.

Q. Your firm had a running open account with Corbari, I take it?

A. No, we had a note from Mr. Corbari.

Q. What was the note for, given for money or merchandise?

A. It was given, the notes were given for payment of checks and drafts that were no good.

Q. And the drafts were given for cattle?

A. The drafts were given for cattle.

Mr. Davidson: In other words, the note was actually for the purchase of cattle?

The Witness: No.

By Mr. Halley:

Q. I'd like to go on record again.

Q. You state Mr. Lord, that the note of December 31, 1948, was given as a renewal note?

A. Yes.

Q. For the same amount? Was the old note in the same amount, \$15,041.34?

A. No, the old note was \$16,041.00 and he paid a thousand dollars and interest to that date.

Q. On December 31, 1948, he paid your firm a thousand dollars plus interest, is that right?

A. That is right, and gave us this renewal note.

Q. And how much has been paid on this December 31st, 1948, note?

A. Seven Hundred Fifty Dollars.

Q. When was that paid?

A. That was paid—the date I can't remember. It was when I was in Tracy, 1950, early 1950.

Q. Was it paid before or after this assignment?

A. Before—no, it was paid after the assignment.

Q. So it was paid sometime after October, 1950?

A. Yes, I believe it was.

Q. That was down at Tracy? A. Yes.

Q. Was any discussion had at that time as to the shares of stock we have been talking about?

A. No.

Q. Did you ever ask Mr. Corbari to deliver to you the stock of this corporation?

A. Not after the assignment.

Q. You made no demand on him whatsoever?

A. Not after the assignment.

Mr. Halley: I think that is all.

Notary Public's Certificate attached.

[Title of District Court and Cause.]

DEPOSITION OF ARCHIE EUGENE CORBARI

Be it remembered that, pursuant to stipulation hereunto annexed in the above-entitled matter, the deposition of Archie Eugene Corbari, a defendant herein and a witness produced for and on behalf of the plaintiffs, was taken before me, Leota Raiford, a Notary Public in and for the County of Washoe, State of Nevada, duly commissioned, qualified, and acting, beginning at the hour of 11:30 o'clock a.m. on Friday the 17th day of October A.D. 1952, at the law offices of John S. Halley, Esquire, First National Bank Building, in the City of Reno, County of Washoe, State of Nevada; the plaintiffs being

represented by George Greenfield, Esquire, and Laurence N. Smith, Esquire; appearing as counsel for the defendant, A. E. Corbari, was John S. Halley, Esquire and for the defendant, Diamond-S Ranch Company, a corporation, John Davidson, Esquire; that the said witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the testimony he was about to give in the above-entitled matter, whereupon said witness was examined upon oral interrogatories propounded by counsel, and made answers thereto, under oath, as hereinafter contained, and the following proceedings were had:

Mr. Halley: The defendant A. E. Corbari's deposition is being taken pursuant to stipulation between counsel for the plaintiffs and the attorney for the defendant, Corbari, dated the 14th of October, 1952; said deposition to be taken by the plaintiffs. The plaintiffs are appearing at this deposition by Laurence N. Smith of Smith & Ewing of Caldwell, Idaho and George Greenfield of Carver, McClenahan & Greenfield of Boise, Idaho. Archie Eugene Corbari, a defendant herein, of lawful age, produced as a witness by the plaintiffs herein, being first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Greenfield:

Q. Will you state your full name Mr. Corbari?

A. Archie Eugene Corbari.

Q. Where do you live now?

A. Right now at Golconda, Nevada.

Q. And what is your present business, how are you employed? A. Ranch manager.

Q. Is that the Diamond-S Ranch Company?

A. Yes.

Q. You are in charge of their ranching operations? A. That is right.

Q. When did you first become interested in the Diamond-S Ranch Company?

A. 1945, I guess.

Q. What was the nature of your interest at that time? A. At that time I was a stockholder.

Q. Do you recall to what extent you were a stockholder when you first became interested?

A. At that time I had about three hundred and ten shares, I believe.

Q. That was your original — represented your original investment? A. That is right.

Q. And when did you become an officer in the corporation? A. I guess in '46.

Q. What position did you have on the Board of Directors at that time?

A. I don't remember.

Q. You were a member of the Board of Directors? A. I was a member of the Board, yes.

Q. From 1945 when you first became interested in the corporation, until the present date, who has been the managing agent or managing officer of the corporation?

A. Let me see now. Explain that again.

Q. Well who has handled the principal business transactions of the corporation?

A. The President.

Q. Who is that? A. Sam Wahyou.

Q. Who has custody of the corporate books?

A. I suppose he has now.

Q. And has he had as long as you have been connected with the corporation?

A. Oh, yes.

Q. He has always had custody of the books?

A. Yes.

Q. When you became associated with the corporation in 1946, was Wahyou in the corporation at that time? A. Yes, sir.

Q. And he has been with it ever since?

A. Yes, sir.

Q. Do you know whether or not the corporation in 1945 and since, has employed a regular attorney?

A. I believe it has.

Q. Who is that?

A. At the time I was in there it was MacComber.

Q. That is Forrest MacComber of Stockton, California? A. Yes, sir.

Q. So Forrest MacComber has at all times since you became associated with the organization, and up to the present time, is the regular counsel for the corporation? A. I believe so.

Q. Do you know if he is still attorney for the corporation? A. I wouldn't know as of today.

Q. Was he the attorney for the corporation at any time this year?

A. I don't know anything of the books this year at all.

Q. How about last year?

A. Neither last year.

Q. When is your last knowledge of MacComber being attorney for the corporation?

A. About '49.

Q. Now directing your attention to December 31, 1948, did you on that date execute a Promissory Note in favor of John W. Smeed or order in the amount of \$15,041.34? A. Yes, sir.

Q. And will you state whether or not you have paid anything on that note since the date of execution? A. I believe I did.

Q. How much?

A. One time a thousand dollars, another time seven hundred and fifty.

Q. Let me ask you then, are you sure the thousand dollars you referred to was paid after you executed the note, or was it paid on a debt you owed before you executed the note?

A. I don't remember.

Q. It could have been the other way?

A. It could have been and could have not. I know I paid a thousand dollars once and seven hundred and fifty dollars.

Q. It may have been you executed the note after you paid the thousand dollars?

A. I don't remember.

Q. What was the amount of your original indebtedness to Smeed?

A. I think it was around fourteen thousand. I don't remember the figure exactly.

Q. In any event, on December 31, 1948, you executed your note in his favor for \$15,041.34?

A. I don't remember the figure, but I do know the note.

Mr. Halley: Do you have that note with you?

Mr. Greenfield: I have a copy attached to the pleadings. We don't have the original, no.

Mr. Greenfield: Referring then, Mr. Corbari, to October 31, 1950, on that date did you execute an assignment of your interest in the Diamond-S Ranch Company to John W. Smeed.

Mr. Halley: Just a minute. May I ask if you have that assignment?

Mr. Smith: Yes, we have that. No, the original is not here.

Mr. Greenfield: Strike that last question. I want to rephrase it. Let me ask you if, on October 31, 1951, you executed an assignment of all your interest in the Diamond-S Ranch Company to W. W. Lord as trustee of the John W. Smeed estate?

Mr. Halley: Just a minute before you answer that, Archie. I object to the form of your question Mr. Greenfield on the ground that the copy of the assignment attached to your complaint as Exhibit B, purporting to be a true copy as I read it, is an assignment of his interest in a partnership rather than the Diamond-S Ranch Company.

By Mr. Greenfield:

Q. I will rephrase the question. Did you on October 31, 1950, assign to W. W. Lord, trustee of the John W. Smeed estate, all of your right, title and interest in and to the assets of a partnership that was formed by reason of the dissolution of the Diamond-S Ranch Company at a prior date?

A. I don't know there was any partnership there. I thought it was a corporation.

Q. You are acquainted with the Diamond-S Ranch Company?

A. Up until about '49 I am. It was a corporation only.

Q. When you made an assignment to W. W. Lord on October 31, 1950, of all of your right, title and interest in and to the assets of the Diamond-S Ranch Company, what were you intending to convey to Mr. Lord?

Mr. Halley: Just a second. I think the witness is entitled to see the assignment and in the absence of you having the original here, I would assume both you and Mr. Smith represent this is a full, true and correct copy of that assignment and in lieu of examining the original he should have the opportunity to examine the copy.

Mr. Greenfield: I will be perfectly willing.

(Witness examines document.)

Mr. Greenfield: Let me reform the question. Mr. Corbari you have examined the document designated as Exhibit B attached to the complaint in this action, and I ask you whether or not on October 31, 1950, you and your wife, Marie Corbari, executed that document?

Mr. Halley: On the basis of the representation of counsel for the plaintiffs that this is a full, true and *correct* of the original assignment executed on the 31st day of October, 1950, we can stipulate for the purpose of the record that it was signed by A. E. Corbari and his wife, Marie Corbari, on that

date and acknowledged before a Notary Public in and for the State of California, County of San Joaquin.

Mr. Greenfield: That is fine.

Q. Now Mr. Corbari, a few days prior to your execution of this assignment do you recall being in Caldwell, Idaho, and discussing the assignment with Mr. Smith, attorney for the Smeed estate and W. W. Lord? A. Yes.

Q. Do you recall that Mr. Lord told you that he either expected you to pay what you owed or secure it? A. That is right.

Q. At that time you agreed to secure it by assigning your interest in the Ranch Company?

A. The corporation.

Q. Do you also recall at that time informing Mr. Lord and Mr. Smith that your interest in the ranch company was free and clear? A. No.

Q. You deny saying that?

A. I told them there was a pledge on it, the bank in Stockton at all times. They knew it.

Q. You didn't tell them you had paid the bank off?

A. No, I told them the bank was crowding me, that is why I wanted them to take the stock at the time and they wouldn't do it.

Q. When you executed this assignment of your interest in the ranch, it was your intention, was it not to convey to the Smeed estate all of your right, title and interest to the ranch, subject then, as you say, to the lien at the bank? A. Sure.

Q. Now when did you first become indebted to

the Bank of America? A. 1948.

Q. And what was the original amount of the indebtedness? A. Around \$15,000.00.

Q. How did you secure that debt?

A. I didn't secure it at that time, just my signature.

Q. You borrowed the money on a note?

A. Yes.

Q. Then did there come a time when you did leave security with the Bank of America?

A. Yes, my shares.

Q. When was that?

A. About the end of '48.

Q. And how many shares did you leave at the Bank of America at that time?

A. Three hundred and ten.

Q. Did that represent all of the shares you had in the Diamond-S Ranch Company?

A. Yes.

Q. Did that constitute a pledge of those shares, or do you know? A. Yes.

Q. At the time you pledged your shares with the Bank of America, Mr. Corbari, how much did you owe the bank at that time?

Mr. Halley: If you know, Archie.

The Witness: I don't remember how much it was, pretty near all of it.

By Mr. Greenfield:

Q. Had you made any payments on the original fifteen thousand dollar indebtedness at the time you pledged your stock?

A. Very small payments.

Q. After pledging your stock did you make any payment to the Bank of America?

A. One small payment.

Q. Do you recall the amount of it?

A. No, I can't.

Q. Do you recall when you made it?

A. In '49, I think.

Q. Now, directing your attention to September 7, 1950, I ask you if on that date the Diamond-S Ranch Company filed voluntary dissolution papers with the Secretary of State of the State of Nevada? A. I don't know.

Q. On September 7, 1950, Mr. Corbari, you were a director and officer of the Diamond-S Ranch Company, were you not? A. In what year?

Q. 1950. A. Yes, I was a director.

Mr. Greenfield: I'd like this marked Exhibit 1.

(Thereupon the Notary Public marked a photostatic copy of a document "Plaintiffs' Exhibit 1".)

Mr. Greenfield: Mr. Corbari, I show you what purports to be a photostatic copy of the document entitled "Written Consent of the Shareholders of the Diamond-S Ranch Company to Voluntary Dissolution", and on page 2 thereof I ask you if your signature appears on the right hand column?

Mr. Halley: For the purpose of the record, we will stipulate that Mr. Corbari's signature appears on plaintiffs' Exhibit 1, purportedly signed on September 1, 1950, for three hundred and ten shares.

Mr. Greenfield: Would you do this also: Would you stipulate that Mr. Corbari on that date gave

his written consent to the voluntary dissolution of the corporation?

Mr. Halley: The document purports to state that he gave his consent.

Mr. Greenfield: Archie ought to know if he gave his consent or not.

Mr. Halley: The instrument speaks for itself.

(Off record discussion between counsel.)

Mr. Halley: We will stipulate he executed this instrument marked "Plaintiff's Exhibit No. 1".

By Mr. Greenfield:

Q. Mr. Corbari, on September 1, 1950, when you signed the instrument, a copy of which is plaintiffs' Exhibit No. 1, and gave your consent to the voluntary dissolution of the Diamond-S Ranch Company, a corporation, you were an officer and a director of the corporation at that time, were you not? A. Yes, according to that, yes.

Q. Now, Mr. Corbari at the time you consented in writing to the dissolution of the corporation, your shares of stock were still pledged with the Bank of America? A. Oh, yes.

Q. And according to your previous statement, those shares of stock remained pledged with the Bank of America on October 31, 1950, when you made your assignment to the Smeed estate?

A. I know they were always in the bank.

Q. They were there when you made the assignment? A. Certainly they were there.

Q. When did you redeem your stock from the Bank of America?

A. I never did redeem it.

Q. Do you know what happened to it?

A. Sure, I owed some money on it and they were going to sell out.

Q. You believe the bank sold the stock?

A. The stock was always at the bank.

Q. And you believe the bank sold it?

A. No, the bank wanted their money on the stock, and I told the Smeed Company about it, wrote them all about it. I owed Sam Wahyou money. I told them the bank was going to sell that stock, now "What are we going to do?"

Q. When did the bank sell the stock, do you know? A. No.

Q. Do you recall whether or not you received any papers from an attorney or from the bank relative to the sale of the stock? A. Yes.

Q. What papers were those?

A. Letters.

Q. What did they say?

A. If I didn't come in and take up the obligation, the only chance they had to redeem their money was to sell the shares, regardless of what cost they brought.

Q. Do you have the correspondence?

A. Oh, yes.

Q. Where do you have it?

A. In my files, or (to Mr. Halley) have you got it?

Mr. Greenfield: Will you furnish us copies of all correspondence between Mr. Corbari and the bank on this subject?

Mr. Halley: I will furnish all I have. I don't

know whether it is all or not. The only thing I have in the office file here from the bank is this one letter.

Mr. Greenfield: Apart from the letter of November 2, 1949, signed by Ernest F. Segale, Assistant Manager of the Bank of America at Stockton with reference to your debt, did you receive any other letters or notices from the bank relative to your stock?

The Witness: I think I have.

Mr. Halley: Here is another one.

By Mr. Greenfield:

Q. In any event, the Bank of America had not sold your stock at the time you made your assignment to Smeed? A. I don't remember.

Q. Do you remember whether or not the Bank of America had sold your stock at the time the corporation was voluntarily dissolved in September of 1950? A. I don't remember.

Q. You don't know at all? A. No.

Q. At the time you made your assignment to Smeed, did you know whether or not the stock had been sold or not?

A. That I don't remember either.

Q. Then do I understand you made the assignment to Smeed without knowing if you had anything to assign or not?

A. No, I told Smeed we had to pick that stock up.

Q. Did you know the stock had not been sold when you made the assignment?

A. I don't think it was sold.

Q. You don't think it was sold at the time you made the assignment? A. No.

Q. That is what I want to know. Do you recall in March of this year an occasion when Mr. Smith, Bill Johnson and myself visited you at the Diamond-S Ranch Company? A. Yes.

Q. Do you remember telling us at that time you redeemed this stock from the bank and paid the bank with your own money?

A. I said I didn't remember whether I did that or not.

Q. So you say now you told us you didn't know whether you redeemed it yourself or not?

A. That money was owing and I wanted to pick it up. I owed Wahyou. He wanted his money; someone had to pick the stock up.

Q. Do you deny you told Mr. Smith, Mr. Johnson and myself that you went to the bank and paid the bank with your own money and got the certificates of stock from the bank? A. No.

Q. You deny that? A. Yes.

Q. Do you recall our asking you whether or not Mr. Wahyou had paid the bank and you replied that he had not paid the bank, that you had paid the bank with your own money.

A. No, I don't.

Q. You didn't say that? A. No.

Q. Have you ever seen your certificates of stock since you left them with the bank? A. No.

Q. So you deposited your certificates of stock with the bank, I think you said in '48 and you have never set eyes on them since? A. No.

Q. That is the truth? A. That is right.

Q. Now you say that at the same time you were negotiating with the Smeed Company with reference to the money you owed them, that Wahyou was also crowding you? A. Oh, yes.

Q. When did you first become indebted to Wahyou? A. 1947.

Q. And how much did you owe him at that time? A. Around \$14,000.00.

Q. How did you become indebted to Wahyou in that amount?

A. Well, I bought cattle off of him, stock.

Q. Did you buy stock from Wahyou or the Diamond-S Ranch Company? A. Wahyou.

Q. His personal cattle? A. Yes.

Q. So you and Wahyou were engaged in cattle operations apart from the Diamond-S Ranch Company? A. I just purchased from him.

Q. And the cattle that you purchased from Wahyou from which this obligation to him arose, you bought for yourself or the ranch company.

A. For myself.

Q. The ranch company was not involved in that at all? A. Not at all.

Q. Then did you later become further indebted to Wahyou? A. No.

Q. So that the full amount of your obligation to Wahyou from 1946 on was about \$14,000.00?

A. About that.

Q. Now did you owe Wahyou this \$14,000.00 at the time you made the assignment to the Smeed estate? A. Oh, yes.

Q. Did you tell Mr. Lord or Mr. Smith about your indebtedness to Wahyou? A. No.

Q. Now after having made the assignment to Smeed, did you have occasion to discuss your debt with Wahyou? A. Say that again.

Q. Strike that. I will state it again. After you made your assignment to the Smeed estate of your interest in the ranch, after that, did you discuss your indebtedness to Wahyou with Wahyou?

A. No.

Q. Did he ever come to you and talk to you about your debt? A. Yes.

Q. After you made your assignment to Smeed?

A. I could correct that question different. I told the Smeed Company we had to take the stock up at the bank. I had an attorney write them a letter.

Q. I understand that. My question is: After you made your assignment to Smeed, did you talk to Wahyou about your debt to him? A. No.

Q. Or did he talk to you about it?

A. He talked to me about it.

Q. This was a one-sided conversation. He talked to you; you didn't talk to him. What did he say?

A. He asked me about the money and I said as soon as I got this straightened out and got the money out I could straighten up with him at the same time as I wanted to straighten up with these people until that company went bankrupt. They held it for two or three years in the bankruptcy court.

Q. You explained to Wahyou that you were pretty well strapped, you owed money to Smeed

and you owed money to him and you were going to try and clean them both up?

A. That is right.

Q. This was after you made your assignment to Smeed?

A. I think it was before if I remember correctly.

Q. My original question was whether or not you talked to Wahyou or he talked to you about your debt after you made the Smeed assignment and you say he did talk to you, is that right or wrong?

A. He talked to me before because I wrote to them and told them about these shares in the bank and I wanted them to take them out of the bank and hold them, and they wrote back and said they couldn't do it.

Q. Did Wahyou ever talk to you about your debt after you assigned the thing to Smeed?

A. Before and after, both.

Q. On all of the occasions when you talked to Wahyou about your debt to him, you explained to him you were hard-pressed for money, you owed Smeed and you owed him, and you were going to take care of both of them when you could, is that right?

A. Yes.

Q. Did you also tell Wahyou you had made this assignment to Smeed?

A. I think I did.

Q. You think you did?

A. Yes.

Q. When you had these conversations with Wahyou, where would they take place? Would he come out to the ranch?

A. He'd come out to the ranch and I talked to him. At that time I was in my own place.

Q. So you feel quite certain that Wahyou knew that you had made this assignment to Smeed subject to what you owed the bank?

Mr. Halley: If you know.

The Witness: I don't remember, yes or no, but I believe I did talk to him.

By Mr. Greenfield:

Q. You believe you did tell him that?

A. Yes.

Q. Now this \$14,000.00 you owed Wahyou, had you ever given him any security for it?

A. No, it was an open bill.

Q. That was just an open bill? A. Yes.

Q. Was it represented by a promissory note?

A. No, it wasn't.

Q. It was just an oral contract, an oral obligation? A. That is right, a bill.

Q. It was never at any time secured by your stock or your interest in the ranch or in any other way? A. No.

Q. Do you have, or has there ever been any written evidence of the Wahyou debt?

A. Bills.

Q. You mean bills from Wahyou to you?

A. Yes.

Q. Nevertheless, you stated you owed him \$14,000.00 and he wanted his money?

A. He carried it on his books as a bill.

Q. What books? A. I don't know.

Q. Have you ever seen his books?

A. No.

Q. Have you ever seen any written evidence of the debt?

A. All I got is the bills for the cattle I purchased.

Q. Where would the bills come from?

A. From him.

Q. Have you talked with Wahyou since this suit was filed against you? A. No.

Q. You have never seen him to talk to him?

A. No.

Q. Are you familiar with the fact that Wahyou obtained your shares of stock in the Diamond-S Ranch? A. Sure.

Q. Do you know when he obtained them?

A. I couldn't tell you the date, no.

Q. Do you know what year it was?

A. '50.

Q. How did you happen to find out about it?

A. How did I find out about it?

Q. Yes. A. The company told me.

Q. Who, in the company, told you?

A. Well, he did, the attorney.

Q. What attorney?

A. MacComber, their attorney.

Q. Where were you when this conversation took place? A. Stockton.

Q. How did you happen to go to Stockton?

A. At that time I lived in Stockton.

Q. Who first approached you about the fact that Wahyou had your stock?

A. The attorney told me the bank was selling that stock. They wrote a letter to the Smeed Com-

pany to pick the stock up and they wouldn't do it. They have a letter to that effect.

Q. That was in 1950? A. Yes.

Q. Can you tell me whether or not you were given any opportunity to redeem the stock yourself? A. Yes.

Q. This was an opportunity given you by the bank or Wahyou? A. By the bank.

Q. Did Wahyou ever give you an opportunity to redeem the stock? A. No.

Mr. Halley: Wait a minute. I will have to object to the form of that.

By Mr. Greenfield:

Q. After Wahyou acquired the stock, did he ever give you the chance to get it back?

A. No.

Q. So ever since 1950 Wahyou has had your stock, since 1950?

A. The Smeed Company was offered a chance to buy it, but they didn't do it.

Q. At the time Wahyou picked up your stock, how much did you owe him?

A. A little better than \$14,000.00 with the interest.

Q. You owed him the full amount of the original obligation? A. Yes.

Q. Before you entered into this assignment with the Smeed Company, did you discuss this with MacComber? A. Yes.

Q. You told MacComber you owed Smeed this money and discussed what to do about it?

A. I had MacComber offer to try and settle it.

Q. That was in 1950.

A. I had a friend who would give me \$5,000.00 to help me out and I made them the offer, but they wouldn't take no stock or take no settlement.

Q. Now when the Smeed Company told you they would want to have this debt secured or paid, one or the other, you discussed that with MacComber? A. Yes.

Q. And after that you did execute the assignment, and did you discuss that with MacComber?

A. No, I didn't.

Q. But he knew you were going to make the assignment? A. Half-way, yes.

Q. As a matter of fact the offer of settlement from MacComber on your behalf was made in February of 1951, was it not?

A. I don't remember.

Q. Do you believe it possible that your offer of \$5,000.00 in settlement, took place after you made the assignment?

Mr. Halley: If you have the original of that—
By Mr. Greenfield:

Q. Well, then Mr. Corbari you discussed the assignment you made to Smeed with MacComber after you had made it and as a result of your discussion he sent a letter to the Smeed Company on February the 9th, 1951, offering \$5,000.00 in settlement, is that right?

A. I told him that is what I wanted to do.

Q. You told him you made the assignment and you wanted to clear it up? A. Yes.

Q. At that time MacComber was attorney for the Diamond-S Ranch Company, was he not?

A. I guess he was, yes.

Q. Do you know whether MacComber has ever been Wahyou's personal attorney?

A. I don't know.

Q. But, as attorney for the corporation he was dealing closely with the president of it?

A. I don't know.

Q. I think you said you never discussed the assignment to Smeed with Wahyou? A. No.

Q. Are you sure of that?

A. I am sure of that now.

Q. Do you have any reason to believe that Wahyou knew of the assignment from any other source?

A. I wouldn't know that. That is his business.

Q. Now returning, Mr. Corbari, to the voluntary dissolution of this corporation which you consented to in September of 1950, do you recall attending any board of directors' meetings of the corporation where this was discussed?

Mr. Halley: The records of the corporation would be the best evidence of that.

Mr. Greenfield: We are not concerned with the best evidence here. We are trying to conduct a discovery procedure and I am entitled to go into it, although I grant that at the trial the minutes of the corporation would be the best evidence.

The Witness: No, I don't remember.

By Mr. Greenfield:

Q. Did you attend the meetings of the Board of Directors of the corporation from time to time?

A. From time to time, yes.

Q. Do you ever recall discussing with any of the other Directors at a meeting or otherwise, the dissolution of this corporation?

A. No, I don't.

Q. Do you have any idea why it was dissolved?

A. I thought they were going to sell the ranch at one time.

Q. Do you think they dissolved it then in preparation for selling it?

A. I believe so.

Q. Do you know if there was any other business purpose they had in mind?

A. No, to try to sell it.

Q. Do you know anything about the corporation reviving its charter in December, 1950?

Mr. Halley: There again, have you got the record on that?

By Mr. Greenfield:

Q. I just want to know whether he knows about it.

A. No.

Q. Were you ever consulted about its revival as a corporation?

A. No.

Q. What was your position with the corporation in December, of 1951?

A. Just ranch manager.

Q. Were you an officer of the corporation at that time?

A. I don't think I was, no.

Mr. Greenfield: I think that is all we have.

Mr. Halley: I don't have any questions.

Mr. Davidson: No questions.

Notary Public's Certificate attached.

[Title of District Court and Cause.]

DEPOSITIONS OF SAM WAHYOU AND
FORREST E. MACOMBER

taken pursuant to stipulation, a copy of which is annexed hereto, on Saturday, 18, October, 1952, commencing at the hour of 10:00 o'clock a.m. thereof at the offices of Forrest E. Macomber, Esq., 711 Bank of America Building, 343 East Main Street, Stockton, San Joaquin County, California, before Herman C. Spalinger, a Notary Public in and for the County of San Joaquin, State of California.

Laurence N. Smith, Esq., of the Law Firm of Smith and Ewing, Caldwell, Idaho; George Greenfield, Esq., of the Law Firm of Carver, McClenahan and Greenfield, Boise, Idaho, appearing for and on behalf of plaintiffs; Forrest E. Macomber, Esq., appearing for and on behalf of John Davidson, Reno, Nevada, Attorney for the Diamond-S Ranch Co.

SAM WAHYOU

called as a witness for and on behalf of plaintiff, being first duly and regularly sworn, testified as follows:

Statutory Cross-Examination

By Mr. Smith:

Q. Mr. Wahyou, will you state your name and residence?

A. Sam Wahyou, W-a-h-y-o-u; 1225 South San Joaquin Street, Stockton.

Q. And, Mr. Wahyou, just for the purpose of the record, Mr. Macomber is your attorney.

A. That's right.

Q. And he is also attorney for the corporation.

A. Yes, he and Davidson.

Q. Well, Mr. Macomber has been the attorney for the Diamond-S Ranch Corporation since it was started. Isn't that true? A. Yes.

Q. During all of its existence. A. Yes.

Q. And you were during all of that time also.

A. Yes.

Q. Now, Mr. Wahyou, the matter under consideration here is largely 310 shares of stock of the Diamond-S Ranch Corporation which was at one time owned by Archie Corbari. A. Yes.

Q. You now claim ownership of that stock.

A. Uh huh.

Q. Where, when and under what circumstances did you acquire the stock?

A. Well, I don't remember what date now.

Q. Well, just tell the—— A. I——

Q. Just make a statement as to what transpired that resulted in your owning the stock.

A. Well, I bought it from the Bank of America.

Q. And when was that purchase?

A. I don't remember.

Q. Mr. Wahyou, the answer of the Diamond-S Ranch Corporation in the case of G. A. Miller, et al., vs. A. E. Corbari and the Diamond-S Ranch, Corporation, states that you purchased the 300 shares of stock on May 21, 1951. Would that be the correct date? A. Something like that.

Q. Well, you don't now claim any other date than May 21, 1951, as the date of your acquiring the stock.

A. No, that's the only time. I bought the stock from the Bank of America because the bank got the stock.

Q. And how much money did you pay for the stock? A. About five thousand, I think.

Q. Do you know how much exactly you paid?

A. Well, I don't know. I got to see the record. I can't tell you offhand. But five thousand is pretty close there.

Q. Did you pay by check? A. No.

Q. How did you pay?

A. I'd take the notes over and I paid the bank later.

Q. I beg your pardon? I didn't get that.

A. I take the whole note from the bank.

Q. You just bought the note from the bank.

A. Yes.

Q. And paid the note later.

A. Yes, paid the note.

Q. And now, when did you take the notes from the bank? That was early in 1950, wasn't it?

A. No, it was the same date as Archie Corbari—Archie Corbari and his wife was there, I was there, and all this transaction was done entirely at the bank.

Q. Then you went to the bank with Corbari and Mrs. Corbari? A. Yes.

Q. And you paid the money to the bank and took up the notes. Is that correct?

A. No, I didn't pay the money. I told the bank, I say I take the notes over; I say I sign the note and I pay them later, see.

Q. And when was that done, what date?

A. Same day.

Q. On May 21, 1951.

A. I don't know just the day, but I got to look at this note, this record.

Q. Do you have that record available?

A. Well, maybe. I think I have. I could call the—the bank's got them.

Q. I beg your pardon?

A. Just call the bank up. He's got them.

Q. Oh, the notes are still at the bank.

A. Well, they are canceled now because I paid off.

Q. What date did you pay off?

Mr. Macomber: Oh, let's get at it from the——

Q. All right.

Mr. Macomber: He doesn't know a thing about it.

Mr. Smith: All right, Mr. Macomber. Off the record. (Off the record.)

FORREST E. MACOMBER

being first duly and regularly sworn testified as follows:

A. (By Mr. Macomber): I have in my hand a photostatic copy of a note in the sum of \$6,000, dated July 10, 1950, Demand Note, and it's signed by C-Arrow Cattle Company by Lafayette Smallpage and also by A. E. Corbari and Marie Corbari,

as individuals, and that note shows on the back of it that there was a balance of \$5,000 owing on it plus interest on October 17, 1950, at which time it was assigned without recourse to Sam Wahyou by the Bank of America. I will offer that as a——

Mr. Smith: Plaintiffs' Exhibit One and Two?

Mr. Macomber: Yes.

(Photostatic copies of notes above referred to marked for identification Plaintiffs' Exhibits One and Two respectively.)

A. (By Mr. Macomber): Now, that stock——

Q. And now just one minute. That was October 17, 1950, wasn't it?

A. (By Mr. Macomber): Yes. Now, with that note—by the way, that note was a renewal note of the balance due on a previous note to the Bank of America by Corbari. I don't know what the original note was for, the amount. Something had been paid on it. That information is not available to me.

Q. I see.

A. (By Mr. Macomber): With that original note the bank took a pledge of 310 shares of the Capital Stock in Diamond-S Company standing in the name of Archie Corbari evidenced by two certificates, one certificate No. 40, for 250 shares and one certificate No. 23 for 60 shares. Now with that note, and to secure that \$6,000-note, went a general pledge agreement for it; I will have that photostated.

Q. Yes. That will be by agreement, the pledge agreement will be photostated and made a part of the record here?

A. (By Mr. Macomber): That's right. Here is the original note of which the photostatic copy is in evidence. Now, I might say that at the time Mr. Wahyou bought this note the bank was demanding immediate payment or they were going to foreclose their security interest in the stock so by virtue of that pledge agreement that I just mentioned I, acting on behalf of Sam Wahyou, foreclosed the stock at a public auction under the pledge sale and attached to the stock certificates that I have in this Diamond-S Ranch Company stockbook are the notices of sale and the constable's affidavit of posting the notices, my certificate of—or my affidavit of sale showing that the property was sold to Gordon J. Aulik by myself acting as attorney-auctioneer on behalf of Sam Wahyou for \$5500, and that sale was on the 21st of May, 1951, 9:15 at the Courthouse. I will have copies of these notices made for you.

Q. Yes, if you will furnish photostatic copies as Exhibit 3.

A. (By Mr. Macomber): I'll furnish you just copies. They don't have to be photostats.

Q. All right.

A. (By Mr. Macomber): Probably be carbons. Now, at the time Mr. Corbari—Mr. Wahyou bought this stock, Mr. Corbari and his wife executed—no, Mr. Corbari executed an additional pledge agreement. You can read it. I'll furnish you a copy of that.

Q. Mr. Macomber, one question: Were these shares of stock ever issued in the name of Bank of America as pledgee in accordance with this pledge?

A. (By Mr. Macomber): The shares of stock were endorsed in blank by Mr. Corbari and in the possession of the Bank of America. That, I might say, is sufficient delivery of the pledge. They were never issued in the name of the bank.

Q. Wasn't it provided for in the pledge? It provided that it should be, and I wondered if you complied with that term of the pledge.

A. They were not issued in the name of the bank because immediately after the execution of that agreement Mr. Wahyou purchased the note, and their collateral——

A. (By Sam Wahyou): In fact, the bank wrote me two or three letters about that, too.

A. (By Mr. Macomber): What?

A. (By Mr. Wahyou): The bank wrote me two or three letters about that.

A. (By Mr. Macomber): O.K. Now, I will call your attention to a thing that might be of interest to you.

Q. Yes.

A. (By Mr. Macomber): And that is that this note mentioned in this second pledge agreement whereby Corbari was indebted to Zignago on a note in the sum of \$12,500, that note was actually made payable to me and I had sold it to Zignago and in order to—before Zignago would buy that note from me he insisted that both myself and Sam Wahyou guarantee the payment of it, and here is the copy of the guarantee I gave him and Mr. Wahyou gave him. I will furnish you a copy of that.

Q. All right.

A. (By Mr. Macomber): As you can see, Mr. Wahyou's object in buying the stock was to protect himself and myself on—if there be any—if the stock is worth more than he paid the bank for it, to protect himself on this obligation, he was acting as guarantor.

Q. Mr. Macomber, what was the value of the stock at the time this pledge was purchased from the bank?

A. I'd have to guess at that.

Q. What would be your guess?

A. My guess would be that it would be worth approximately twenty-five per cent of its face value.

Q. And what was its face value?

A. \$31,000. Do you want to know why?

Q. Yes.

A. (By Mr. Macomber): Because this ranch had been operated at a loss over—at the time this stock was purchased from the bank by Sam Wahyou, the Diamond-S Ranch Company had operated at a considerable loss. It was run down and it owed very large sums of money so that the book value of the stock, I would estimate to be not over twenty-five per cent of the face value.

Q. Have you available any financial statements of the Diamond-S Corporation?

A. (By Mr. Macomber): No, they are in the hands of the Diamond-S Ranch Company's auditor.

Q. Who is that?

A. (By Mr. Macomber): Mr. Black.

Q. And could we have furnished us a financial

statement as to the condition of the corporation on October 17, 1950; on May 21, 1951,—

A. (By Mr. Macomber): I doubt it because they don't make up financial statements on those dates.

Q. Then can we have—

A. (By Mr. Macomber): But I will attempt to secure for you financial statements as close to those dates as they are made up.

Q. All right.

A. (By Sam Wahyou): Last December.

A. (By Mr. Macomber): What?

A. (By Sam Wahyou): Got one last December.

Q. Last December? All right.

A. (By Sam Wahyou): One in August.

A. (By Mr. Macomber): Well, whatever—the closest ones I can get for you.

Q. Now, so there will be no misunderstanding, at the time that Mr. Wahyou paid off the Bank of America he—

A. (By Mr. Macomber): (Interrupting) He didn't pay off the Bank of America. He bought the note from the Bank of America.

Q. Well, at the time he bought the note from the Bank of America on October 17, 1950, he did that to protect himself for advances that—other advances that he had made to Archie.

A. (By Mr. Macomber): At that time Mr. Corbari owed him monies in addition to the ones I have told you.

Q. How much was that, if you know?

A. (By Mr. Macomber): No, I don't know.

Q. Could that be ascertained?

A. (By Sam Wahyou): Guaranteed one myself, fourteen thousand. Owed close to fourteen thousand. They owe me about around—then guarantee one around—around twelve thousand and something and you and I guarantee one note.

A. (By Mr. Macomber): Yes.

A. (By Sam Wahyou): And plus fifteen hundred, fourteen some he owe me.

Q. Now, did you, Mr. Wahyou, have any agreement with Mr. Corbari at the time you picked up this stock at the bank that he could have the stock back if he could pay you back the six thousand that you had to pay the bank?

A. (By Sam Wahyou): No, I didn't have no agreement.

Q. I beg your pardon?

A. I don't have no agreement with him like that.

Q. You didn't have any agreement at that time.

A. (By Sam Wahyou): No.

Q. Why, then, did you wait from November of 1950 until May of 1951 to foreclose the pledge?

Mr. Macomber: Object to that as argumentative.

Mr. Smith: Q. Well, where—

Mr. Smith: This is an exploratory type of deposition which is allowed under the Federal rules and I think its perfectly lawful. I'd like an answer.

Mr. Macomber: Well, I know but how can—well, go ahead.

Mr. Smith: Q. Why did you wait from the time you purchased this stock in November until May in order to foreclose it?

A. (By Sam Wahyou): I was to wait for a while—I don't know how long—because when I bought the stock from the bank I went to the Bank of America, I told them I don't take the stock from the bank, I was going to pay for it. I told the bank what I wanted in there. I said, "You got rules." I said, "You charge me. You just issue the note. We charge that." Then I give the paper to Macomber. I ask Macomber to look these things over and how could it be done sometime before, but I don't know why. Actually I don't know the regular rules, how they go through with it. I talked to Macomber sometime about this too, how he was going to do it.

Q. You talked to Archie Corbari concerning your picking up this note at the bank, didn't you?

A. Yes.

Q. And what did you say to Corbari about it?

A. I didn't say anything about it.

Q. Well, you discussed the matter of paying this note or purchasing it from the bank with Corbari, did you not?

A. Yes sir.

Q. What did you agree——

A. (By Sam Wahyou): (Interrupting) In fact, the bank was demanding for it.

Q. But why did you buy it from the bank?

A. (By Sam Wahyou): Because I would have the stock here and the stock is worth more money, oh, maybe \$10,000 worth more. He owes me money too. If the bank take that here I'm going to lose. I can't get no money from him. That's why I bought it from him.

Q. In other words, you bought it from the bank to protect yourself for the difference of what you had paid and the value of stock was.

A. That's right.

Q. Well, you knew, of course, you had been acquainted with Archie Corbari for years.

A. Yes, that's right.

Q. And you knew of his entanglements of one kind and another; you knew that he was indebted to Smeed, did you not?

A. I don't know but I know he owe the people money.

Q. Well, you knew that he had purchased cattle from the Smeed Estate in Caldwell and that the checks and drafts did not clear and that he owed Smeed at that time fourteen or \$16,000. Isn't that true?

A. No.

Q. You didn't know that.

A. I didn't know that.

Q. Or you hadn't discussed that with Archie?

A. I got nothing to do with it. How can I know how much he owe the people?

Q. You knew nothing of that transaction then?

A. No.

Q. With Smeed at all.

A. No.

Q. And now, you say that Mrs. Corbari came down to the bank on the day that you purchased these notes from the bank.

A. Yes.

Q. Why?

A. What do you mean, why?

Q. Why did they go to the bank if you just paid on those for your own account? Did they have to sign something down there?

A. (By Sam Wahyou): I don't know. I don't know whether they sign anything or not. I don't know. But the bank called me about—and foreclose these stock, all that going on there. They had been talking about it for several months, so one day the bank called me about that so I just happened to arrange to Archie and his wife to come in the bank and get this deal straight. I said, "I'm going to take the stock."

Q. And at the time you bought it you had no agreement that Archie could pay you back, if he could pay you back, the money you had in it.

A. No, I didn't have no agreement with him.

Q. And now, Mr. Wahyou, you have been a member of the Board of Directors of this corporation since it commenced.

A. Yes.

Q. And why—what discussions did the Board of Directors have that led you to the decision to dissolve the corporation on September 7th, 1950?

A. 1950? Yes, yes.

Q. What discussion?

A. (By Sam Wahyou): I had a deal that was going on there that the ranch will be sold. We want to dissolve that corporation when we sold the ranch but anyway it—we didn't sell the ranch so we reinstate back this entire matter.

Mr. Macomber: You understand him?

Mr. Smith: Yes, perfectly.

A. (By Sam Wahyou): Yes, that's what it is.

Q. And why—what decisions—what facts came about to make you decide to reincorporate the corporation or to revive the corporation, do you know?

A. (By Sam Wahyou): Well, I'll tell you why we did it, I don't want to say anything about it because I had discussed it with an accountant with our people, that's the way we shall do.

Q. What was that again?

A. We talked to our accountant and the attorney here that's the way we shall do, the tax part of doing this so that's what we did.

Q. You did it because of your attorney's advice relative to taxes. A. Yes.

Q. And now, at that time Mr. Corbari was your attorney. A. Huh?

Q. Mr. Macomber was your corporation attorney. A. That's right.

Q. And he was also your attorney at that time.

A. That's right.

Q. And also Archie Corbari's.

A. Yes, I guess so. I don't know. I don't know Archie, who he use.

Q. Did you know that Archie had offered to pay \$5,000 in settlement of this debt to Smeed?

A. (Negative nod.)

Mr. Macomber: He shook his head no. Answer so he will get it, see.

A. (By Sam Wahyou): I don't know.

Mr. Smith: Q. And now, what other debts were owing to you by Corbari other than the one that was created by your purchase of the notes from the bank?

A. (By Sam Wahyou): I don't know but around fourteen-fifteen hundred dollars plus that note. Twelve thousand, guarantee note.

Q. You mean the one that was to—what is that name?

Mr. Macomber: Zignago.

Mr. Smith: Q. —Zignago?

A. (By Sam Wahyou): Yes.

Q. But the Zignago note was secured by a trust deed on some real estate. Did you have to pay that twelve thousand to Zignago?

A. I didn't have to pay him yet. I just went in town, give him the money, he wanted me to guarantee it.

Q. But at least yet you have not paid it.

A. No, I haven't paid it.

Q. And he owed you fourteen-fifteen hundred dollars other than that, Corbari owed you that amount.

A. Yes.

Q. That's all.

A. That's all.

Q. There were no other transactions in the matter at all.

A. No.

Q. Now, when you were discussing whether or not to dissolve the Diamond-S Corporation, was Corbari present at the meetings?

A. Yes, I think he is. No, he wasn't in the meeting. I don't know how—he was running the ranch out there. Let's see, the general meeting about the sale of the ranch, and he wasn't in the meeting. The time we go down to the title company he was there.

Q. When did you go to the title company and for what?

A. To sell the ranch.

Q. And where was that done, at Winnemucca?

A. No.

Q. Was that done here? A. At Oakland.

Q. At Oakland. A. Yes.

Q. Have you been at the ranch at Winnemucca recently? A. (Pause.)

Q. Do you go up there from time to time?

A. Yes.

Q. Were you there between the 1st of October, 1950, and May 21, 1951?

A. Sure, I am probably up there but I really don't know when. Can't be in six months I have never been there. I have been there a lot of times.

Q. You have been there a lot of times.

A. Yes.

Q. Then between the time the corporation was dissolved and the time you purchased this stock, do you know whether you have been in Humbolt County, Nevada?

A. Yes, but I don't remember now. But I have been up there quite often.

Q. Well, during that period of time? A matter of seven months, would you have been there for sure? A. 1950?

Q. Yes.

A. I couldn't tell you. I should have been up there all right. Six months—I ought to be up there every two months, three or four months.

Q. What was that again?

A. I say I ought to be up there quite often in the last four or five months.

Mr. Smith: As long as we have gone at this kind of backwards, may we ask you some further questions?

Mr. Macomber: Yes.

Mr. Smith: Then we'll just put it all in one.

Q. You handled the dissolution of the corporation.

A. (By Mr. Macomber): That's right.

Q. And you also handled the revival of the corporation.

A. (By Mr. Macomber): Yes sir.

Q. During all of that time you were Mr. Wah-you's attorney.

A. (Mr. Macomber): That's right.

Q. Both personally and the corporation attorney.

A. (By Mr. Macomber): That's right.

Q. And you also were Mr. Corbari's attorney.

A. (By Mr. Macomber): No.

Q. When had you ceased to be Mr. Corbari's attorney?

A. (By Mr. Macomber): I have never been. I have never been on a retainer with Mr. Corbari. He's consulted me as well as other attorneys from time to time, but you are an attorney and you know that we don't necessarily—that you are somebody's attorney continually.

Q. At least in the month of February, 1951, you wrote a letter to the Smeed Estate offering \$5,000 in settlement.

A. That's right.

Q. At that time you were at least Archie's attorney.

A. That was an isolated instance.

Q. You have represented him in prior litigation.

A. I have represented him in several matters, in litigation—quite a few judgments against him.

Q. Yes. And during 1950 and the early part of 1951 you had a considerable number of things to do for him? He was in and out of your office a good deal during that time?

A. No, he's never been in and out of my office a good deal. He's been in and out of the Diamond-S Ranch. He comes in very seldom. But usually if he got served with some papers he'd send them to me and I'd do what I could about it.

Q. At that time, in 1950, he was living here in Tracy and operating there at that time.

A. Yes. Well, even when he lived in Tracy I very seldom would see Mr. Corbari.

Q. At least you had correspondence with him during that time because an auto litigation was on at that time.

A. I think we talked——

Q. (Interrupting) The auto litigation that you remember that he got sued on.

A. No, I didn't represent him.

Q. What litigation was it that you represented him in?

A. Oh, various people sued him for—I don't remember them now. He had three or four suits. People sued him because he owed them money.

Q. And you represented him in that.

A. Yes.

Q. And if there were any questions concerning him and the Diamond-S Ranch he came to you. Is that true?

A. I don't recall that he ever consulted me about anything with reference to the Diamond-S Ranch because I doubt if I would have represented

him in the matter since I represented the Diamond-S Ranch.

Q. Now, Mr. Macomber, coming back to the matter of the foreclosure of this stock, the matters that you have stated in connection with it—that is, the sale and the purchase by Wahyou and the sale of the pledge by notes and the sale—have you told us all that you had to do with that transaction? Is there any other transaction concerning the stock or the deed with which you had anything to do?

A. I don't understand your question.

Q. You advised with Mr. Wahyou at the time he purchased the stock, the notes from the bank.

A. Mr. Wahyou arranged to purchase the note and the pledge agreement and the stock from the bank, and instructed me to proceed.

Q. And were there any other actions or steps taken other than the ones that you have testified to here? A. (Pause.)

Q. There were no other pledges made to anybody or redeemed from anybody? Nobody else instructed any——

A. Not that I know of.

Q. And there were no other actions started.

A. Not to my knowledge.

Q. In other words, the matters you testified to is all that was done in connection with the stock and with the foreclosure of the pledge.

A. Yes. Of course, I haven't related to you every step I took in connection with foreclosing the stock.

Q. Well, you—in the foreclosure your papers will indicate the steps you took.

A. That's right.

Q. You took no steps other than the ordinary statutory requirements in foreclosing of the ranch and selling of the security.

A. That's right.

Q. Mr. Wahyou, I want to come back to what transpired at the bank on the 17th of October, 1950, at the time these checks—or at the time this note was purchased from the bank. Now, you say you went in the bank and bought these notes.

A. (By Sam Wahyou): Yes.

Q. Or bought the note and the pledge.

A. (By Sam Wahyou): Yes.

Q. And how did you pay for it?

A. How I paid for it?

Q. Yes. A. I already told you.

Q. Tell us again.

A. (By Sam Wahyou): I told you the bank, I bought that from the bank, give me the note and the—I signed the note. I owe the bank that money.

Q. You borrowed the money from the bank to pay.

A. Pay that, yes.

Q. And picked up the notes.

A. That's right.

Q. Or picked up the note and the pledge.

A. That's right.

Q. So that you didn't write them a check; you secured the money from them.

A. That's right. That's what I did with the bank, I call in there and do something, according to so much money, and I walk in the bank and sign

the note. But that day I was in there at the bank I say, "Give me the note. I bought this. You give me all the papers." So I signed the note with them.

Q. And you subsequently paid the note.

A. Yes, that's right.

Q. When was that paid?

A. Oh, I don't know when. They got that at the bank. You got to find the record at the bank.

Q. In what way was the pledge agreement from the bank assigned to you, if it was?

A. Well, I don't have any way in going to the bank because I can walk in the bank here and tell them I want five thousand or \$10,000 and all I do is sign my name.

Q. And now, the pledge note, the pledge that secured the stock in Corbari at the time you picked up the note, how did they assign the pledge to you? You have a copy of that assignment, do you, Mr. Macomber?

A. (By Mr. Macomber): No, the pledge agreement was delivered with the note to me. I arranged for that.

Q. Subsequently.

A. (By Mr. Macomber): After he—after he arranged for payment.

Q. How, in the matter of time—when did the pledge agreement come into your possession, Mr. Macomber?

A. (By Mr. Macomber): Mr. Wahyou went in the bank and arranged for payment. I had nothing to do with that. Then he called me up. Either he called me up or the bank called me up and told me

to come get the papers. I went over there and arranged for the assignment of the note and delivery of the stock and the collateral pledge agreement all at the same time.

Q. And did they——

A. (By Mr. Macomber): (Continuing) Either the same day or the day after or within a few days of the time that he had paid for the purchase.

Q. Were there any other instruments signed by the bank other than the endorsement that appeared on the back of the note which is Plaintiffs' Exhibit One and Two?

A. (By Mr. Macomber): No, they delivered them to me.

Q. They delivered the stock and the pledge agreement and assigned the note.

A. (By Mr. Macomber): That's right.

Q. And that was all.

A. (By Mr. Macomber): Yes.

A. (By Sam Wahyou): All I want is what I am entitled to and what the bank is entitled to.

Q. I'm sorry, I didn't understand you.

A. (By Sam Wahyou): I want to take all the stock from the bank—I called Mac, somebody to go up there and get the papers and get everything from the bank. I don't want to leave it half way. Then I pay the note and pay the stock for them.

Q. Mr. Wahyou, were you interested in any way in the C-Arrow Cattle Company?

A. What is that?

Q. Were you interested in any way in the C-Arrow Cattle Company?

A. (Negative nod.)

Q. Better answer yes or no. A. No. No.

Q. He can't see you nod your head. You had no part of that transaction with Archie Corbari.

A. No.

Q. Mr. Macomber, are there now, or have there ever been, any other pledge agreements other than the two which we have discussed here and the others you are going to furnish us copies of?

A. (By Mr. Macomber): Not to my knowledge.

Mr. Smith: I think that is all. I have no further questions.

Mr. Macomber: No questions.

/s/ SAM WAHYOU,

Signature of Witness

/s/ FORREST E. MACOMBER,

Signature of Witness

Subscribed and sworn to before me on this 17th day of November, 1952.

[Seal] /s/ HERMAN C. SPALINGER,

Notary Public in and for the County of San Joaquin, State of California.

DISCOUNT _____ % \$ _____ DUE _____ January 6, 1951

Stockton CALIF.: July 10, 1950

on demand, if no demand is made then on January 6, 1951.

FOR VALUE RECEIVED, I PROMISE TO PAY IN LAWFUL MONEY OF THE UNITED STATES OF AMERICA,

TO THE ORDER OF THE **Bank of America** AT ITS Hunter "quare BRANCH IN
NATIONAL EXCHANGE ASSOCIATION

THIS CITY Six thousand and no/100 - - - - - date AT THE RATE OF 4 $\frac{1}{2}$ PER CENT
WITH INTEREST IN LIKE LAWFUL MONEY FROM January 6, 1951 AND monthly
PER ANNUM UNTIL PAID. PAYABLE ON January 6, 1951

THEREAFTER, AND IN THE EVENT OF COMMENCEMENT OF SUIT TO ENFORCE PAYMENT OF THIS NOTE, I AGREE TO PAY SUCH ADDITIONAL SUM AS ATTORNEYS' FEES AS THE COURT MAY ADJUDGE REASONABLE.

ADDRESS: 511 Stkn. Sav. Loan Bldg.

C-Arrow Cattle Co:

NONHET

Picking Up
~~at the station~~
at Carbon.

[illegible]

C-Arrow Cattle Co., DATE 4¹/₂ x DUE 1/6/51

No. 072514 NAME Wm. J. ...

paid on principal by 9/10/50

FOR VALUE RECEIVED, the undersigned, jointly and severally, endorse, guarantee and promise to pay the note on the reverse hereof and all extensions and renewals thereof, which extensions and renewals may be made without notice to or consent of the undersigned, and all taxes and insurance premiums and any other sums that may become due and payable under and by virtue of the provisions of any Deed of Trust (or Mortgage), or other instrument of security, securing the aforesaid note, and hereby waive (a) pre-emption, demand, protest, notice of protest, notice of dishonor, and notice of non-payment; (b) the right if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the maker to the holder, howsoever arising, shall have been paid; (c) the right to require the holder to proceed against the maker, or to pursue any other remedy in the holder's power; and agree that the holder may proceed against the undersigned directly and independently of the maker, and that the cessation of the liability of the maker for any reason other than full payment, or any release or subordination of security, or any impairment or suspension of, or any extension, renewal, forbearance, change of rate of interest, or acceptance, of the holder's remedies or rights against the maker, shall not in anywise affect the liability of the undersigned hereunder.

INTEREST PAID

DATE	AMOUNT
44 OCT 17 50	44 44 25

PAID ON ACCOUNT OF PRINCIPAL

DATE	AMOUNT	BALANCE
44 OCT 17 50	44 44 25	5,000.00
44 OCT 17 50	44 44 25	5,000.00

Stockton, California, October 17, 1950
For value received all interest and title to the within note is hereby transferred to Sam Wahyoun, without recourse.

Bank of America NTSA - Hunter Square Branch
Stockton, California

By --- *[Signature]* Manager.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above matter came on this 18th day of January, 1955, for pretrial, at 2:00 p.m., Miles N. Pike, Laurence N. Smith and Mr. Ewing, of counsel for plaintiffs, John Davidson, of counsel for defendants, and John S. Halley, representing the defendants A. E. and Marie Corbari.

Nature of Case

This is an action wherein the plaintiffs seek to impress a lien on certain ranch property situate in Humboldt County, Nevada, the record title of which is in Diamond-S Ranch Co., a Nevada corporation. Plaintiffs predicate their theory of [95] the case on the fact that A. E. Corbari and wife assigned their stock in the Diamond-S Ranch Co. for the purpose of securing a promissory note executed by the Corbaris to John W. Smeed. It is asserted that by reason of such assignment plaintiffs have a proportionate interest in the assets of Diamond-S Ranch Co. property, and particularly in and to the real property situate in Humboldt County, Nevada.

Agreed Statement of Facts

All of the allegations contained in the first cause of action, being on the Corbari-Smeed note, are admitted save and except Corbari contends that he

paid an additional \$1,000.00 on the note for which he was not given credit.

All of the matters alleged in the second cause of action are admitted with the exception of the allegations going to illegality and fraud and these are denied.

All of the matters alleged in the third cause of action are admitted except illegality and fraud, and these are denied.

All of the matters alleged in the fourth cause of action are admitted save and except illegality and fraud, and these are denied.

The defendants, Zignego, Macomber, Thomas G. Lee, Toy Quong, Joe Sin, Yip K. Toon, and Herbert Jang, disclaim any right, title or interest in the property and assets of the Diamond-S Ranch Co., and/or in the stock thereof.

The Issues and Contentions

The issues are, as to the first cause of action, whether an additional one thousand dollars should be credited upon the Corbari-Smeed note; as to the remaining counts whether or not the admitted facts are sufficient to create a lien against the assets of Diamond-S Ranch Co., be it presently existing as a corporation, or dissolved and its [96] assets being presently held by its last board of directors as trustees in dissolution. Plaintiffs assert that the Court should declare such lien to exist; defendants position is that neither facts or law support such a position.

Proof

With the exception of proof bearing upon the additional payment of \$1,000.00 which the Corbaris assert they paid on the Smeed note, all of the proof is now before the Court by way of exhibits agreed in evidence at this pretrial, which exhibits are listed in Schedule "A" attached hereto and made a part hereof by reference.

Stipulations

It is stipulated that proof of the alleged \$1,000.00 payment on the Smeed note be submitted to the Court by affidavit with necessary supporting exhibits attached; copies to be served on plaintiffs' attorneys.

Order

Pursuant to discussion and stipulation of counsel, and on the basis of the foregoing comment, it is ordered as follows:

1. That the defendants, A. E. Corbari and Marie Corbari, have twenty days within which to submit proof by way of affidavit of the alleged payment of \$1,000.00 on the Smeed note.

2. That all of the exhibits referred to in Schedule "A" be and they hereby are admitted in evidence.

3. That the parties shall have ten days after submission of proof re the \$1,000.00 additional payment on the Smeed note to make any additional motions, after which the matter will be deemed submitted for decision on the record. [97]

4. That the action be, and it hereby is, dismissed with prejudice as to the defendants, D. W. Zignego and Forrest E. Macomber.

5. That respective counsel may suggest within ten days from this date any necessary or appropriate changes so as to conform to the pretrial discussion. None being offered the order will stand as final. Copies of any proposed changes must be served on counsel for the opposite party who shall have five days from receipt thereof to make and file his consent, or opposition, to such proposed changes, and/or to offer such amendments as deemed proper. It is suggested that counsel confer and agree on changes, reporting to the Court as follows: (1) Changes agreed on; (2) plaintiffs' changes not agreed by defendants; and (3) defendants' changes not agreed to by plaintiffs.

Dated this 18th day of January, 1955.

/s/ JOHN R. ROSS,

United States District Judge [98]

SCHEDULE "A"

Exhibits

It is stipulated that the following exhibits be admitted in evidence without objection, except as hereinafter noted:

1. Pledge Agreement to Bank of America from Corbaris and others, dated January 4, 1949.

2. Typewritten copy of Pledge Agreement dated September 18, 1950, signed by A. E. Corbari only, to Bank of America.

3. Affidavit of Forrest Macomber dated May 23, 1951.

4. Typewritten copy of Notice of Sale of Pledged Property at Public Auction, dated May 14, 1951, signed by Sam Wahyou.

5. Notice of Posting by Constable dated May 16, 1951.

6. Typewritten copy of Resolutions adopted by the Board of Directors of Diamond S Ranch Company at a Special Meeting at Stockton, California, on July 29, 1950, at the office of Forrest Macomber.

7. Typewritten copy of Written Consent of the Shareholders of Diamond S Ranch Company to Voluntary Dissolution—no date—meeting held July 29, 1950.

8. Photostatic certified copy, certified by John Koontz, Secretary of State, of Written Consent of Shareholders to Voluntary Dissolution filed in the office of the Secretary of State on September 7, 1950. Certified photostatic copy of same resolution.

9. Typewritten copy of photostatic copy of Certificate of Revival or Renewal of Corporate Charter of Diamond S Ranch Co.

Document entitled Appointment of Agents for Diamond S Ranch Company, certified to by Washoe County Clerk H. K. Brown by B. Buchanan. Agents are Sam Wahyou, K. R. Nutting and Thomas G. Lee. (Certified typewritten copy.)

**10. Original assignment, with recording data, dated October 31st, 1950, by A. E. and Marie Corbari to W. W. Lord, as trustee.

11. Photostatic copy of a Promissory Note dated January 6, 1951, to Bank of America, signed by Archie Corbari, A. Corbari and Marie Corbari, and C-Arrow Cattle Company, by Lafayette J. Smallpage, for \$6,000.00. Due date January 6, 1951. Date of note, July 10, 1950.

Photostatic copy of reverse side of note showing installment payments.

12. Promissory note dated December 31st, 1948, in the amount of \$15,041.34 executed by A. E. and Marie Corbari to John W. Smeed.

13. List and description of all real property situate in Humboldt County, Nevada, owned by Diamond S Corporation.

*14. Letter dated March 31st, 1949, from Bank of America to A. E. and Marie Corbari.

*15. Letter dated November 2nd, 1949, from Bank of America to Archie and Marie Corbari.

*16. Letter dated November 21st, 1949, from Bank of America to Archie and Marie Corbari.

*17. Letter dated March 25, 1950, from W. W. Lord to A. E. Corbari.

*Admitted in evidence subject to objections as to materiality.

**Admitted in evidence subject to objections as to materiality and competency.

July 11, 55. Exhibit 18. Diamond "S" Balance Sheet as of December 31, 1951 was ordered in evidence as Exhibit No. 18.

Note: Exhibit 11, Photostatic copy of front and

reverse side of promissory note of January 6, 51 is not found in files. [100]

[Endorsed]: Filed Jan. 25, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The plaintiffs, by and through their attorneys of record, Smith & Ewing, Carver, McClenahan & Greenfield, and Pike & McLaughlin, hereby move the court to enter summary judgment for plaintiffs in accordance with the provisions of Rule 56 (a) and (c), Federal Rules of Civil Procedure, on the ground that the pleadings herein, the exhibits attached thereto, the depositions of Archie E. Corbari, Sam Wahyou, Forrest Macomber and W. W. Lord, including the Affidavit of W. W. Lord, filed June 3, 1955, and all the proceedings heretofore had herein show that plaintiffs are entitled to judgment in accordance with the prayer of their complaint as a matter of law.

SMITH & EWING

CARVER, McCLENAHAN &

GREENFIELD

PIKE & McLAUGHLIN

/s/ By MILES N. PIKE,

Attorneys for Plaintiffs [101]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To Archie E. Corbari, Marie Corbari and to John S. Halley, their attorney; to Sam Wahyou, Dia-

mond S. Ranch Co., Forrest E. Macomber, A. E. Corbari, Sam Wahyou, K. R. Nutting, and Thomas G. Lee, trustees for the assets of Diamond S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, Herbert Jang, and D. W. Zignego, and to John Davidson, their attorney:

You and each of you will please take notice that upon the pleadings herein, the exhibits annexed thereto, the depositions of Archie E. Corbari, Sam Wahyou, Forrest Macomber and W. W. Lord, and all the proceedings heretofore had herein, the undersigned will move this court at the United States Courthouse at Carson City, Nevada on the 11th day of July, 1955 at 10 o'clock a.m., or as soon thereafter as counsel can [102] be heard, for an order under Rule 56, Federal Rules of Civil Procedure, for summary judgment in favor of plaintiffs upon all the grounds as set forth in the moving papers herein, and for such other and different relief as to the court may seem just and proper in the premises.

SMITH & EWING
CARVER, McCLENAHAN &
GREENFIELD
PIKE & McLAUGHLIN

/s/ By MILES N. PIKE,

Attorneys for Plaintiffs

[103]

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT AND
FOR JUDGMENT ON THE PLEADINGS

Now come the Defendants Sam Wahyou; Diamond-S Ranch Co., a Nevada Corporation; A. E. Corbari, Sam Wahyou, K. R. Nutting and Thomas G. Lee, trustees for the assets of Diamond S Ranch Co.; Thomas G. Lee; Toy Quong; Joe Sin; K. R. Nutting; Yip K. Toon; [130] Herbert Jang; and move the Court for a Summary Judgment (Rules of Civil Procedure, Rule 56) in their favor and for a Judgment on the Pleadings (Rule 7c of the Rules of Civil Procedure) in their favor, and for the reasons therefore say:

These moving Defendants are entitled to a Judgment on the pleadings and a summary Judgment on the ground that the admitted facts are insufficient to create any lien in favor of Plaintiffs against the assets of Diamond-S Ranch Co.

Dated: June 15, 1955.

/s/ JOHN DAVIDSON,
Attorney for said defendants

NOTICE OF MOTION

To: Plaintiffs above-named and to Smith & Ewing; Carver, McClenahan & Greenfield; and Pike & McLaughlin, their Attorneys.

You, and each of you, will please take notice that the undersigned will bring the above-entitled mo-

tion on for hearing before this Court at Carson City, Nevada, on Monday, the 11th day of July, 1955, at 10:00 o'clock a.m. of that day, or as soon thereafter as Counsel can be heard.

/s/ JOHN DAVIDSON,

Attorney for said defendants [131]

[Endorsed]: Filed June 16, 1955.

In the United States District Court for the
District of Nevada

No. 1029

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, trustees of
JOHN W. SMEED ESTATE, Plaintiffs,

vs.

ARCHIE E. CORBARI, otherwise known as A. E.
CORBARI, MARIE CORBARI, SAM WAH-
YOU, DIAMOND-S RANCH CO., incorpo-
rated under the laws of Nevada, et als.,
Defendants.

OPINION AND DECISION ON MOTIONS FOR SUMMARY JUDGMENT

The above matter being at issue it was set for pretrial on the 18th day of January, 1955, at which time the Court made and entered its pretrial order. On June 16th, 1955, defendants (except D. W. Zignego and Forrest E. Macomber as to whom the ac-

tion has been dismissed with prejudice) filed their motion for summary judgment pursuant to Rule 56 and for judgment on the pleadings pursuant to Rule 7(c). The plaintiffs filed their motion for summary judgment under Rule 56(a)(c) on June 14th, 1955. Points and authorities in support of the respective motions were filed, and the motions were argued on the 11th day of July, 1955.

The plaintiffs' motion for summary judgment was supported by the depositions of Archie E. Cobari, Sam Wahyou, Forrest Macomber and W. W. Lord, and also an affidavit by W. W. Lord. In considering the respective motions of plaintiffs and defendants the Court had before [145] it (1) all of the pleadings, (2) the depositions and affidavit above referred to, (3) the Court's pretrial order, (4) defendants' request for admissions and plaintiffs' response thereto, (5) the eighteen exhibits referred to in the schedule of exhibits attached to the pretrial order, and (6) the stipulation of the parties that they had no further evidence to offer.

Nature of Case

By this action the plaintiffs seek to impress a lien against the property of Diamond-S Ranch Co., one of the defendants, and particularly the real property referred to in Exhibit "C" attached to the original and amended complaint, said real property being situate in Humboldt County, Nevada, the record title being in the Diamond-S Ranch Co., a Nevada corporation. Plaintiffs claim the lien in

their favor by reason of an assignment by A. E. Corbari and Marie Corbari, his wife, dated October 31st, 1950, whereby Corbari and his wife assigned to W. W. Lord, as trustee for John W. Smeed, deceased, all their

“right, title and interest in and to all of my partnership interest in the assets of a certain partnership formed by reason of the dissolution of Diamond-S Ranch Co., a Nevada corporation, and in and to any profits arising from the operation of said partnership.”

There was no actual indorsement and/or delivery of the 310 shares of Corbari stock in the Diamond-S Co., at the time the written assignment was made, or at any later time. At the time of the delivery of the assignment to Lord the Corbari stock certificates evidencing his interest in the Diamond-S were in the actual possession of the Bank of America, Hunter Square Branch, Stockton, California, having been delivered to the Bank by Corbari by way of pledge. [146]

Findings of Fact

Since the facts are somewhat involved the Court states them here in chronological order and as findings of fact. Diamond-S Ranch Co. is a Nevada corporation incorporated December 17, 1945, for the purpose of owning and operating ranch property situate in Humboldt County, Nevada. Of the 1572½ shares of stock issued by the corporation Corbari owned 310 shares, the defendants Sam Wahyou, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nut-

ting, Yip Q. Toon and Herbert Jang owning the balance. On January 4th, 1949, Corbari made and executed to Bank of America, Hunter Street Branch, a general assignment and pledged his 310 shares of Diamond-S stock to the Bank to secure certain indebtedness for which he was wholly or jointly liable.

On September 18th, 1950, Corbari made and executed to the Bank a second pledge agreement securing a promissory note to the Bank dated July 10, 1950, in the amount of \$6,000.00, and also to secure his note to one D. W. Zignego, one of defendants, in the sum of \$12,500.00 on which there was a balance due of \$10,000.00 plus interest, and to secure an indebtedness due one Forrest E. Macomber, another of the defendants named, in the amount of \$12,000.00 plus interest. The pledge agreement of September 18, 1950, was to secure the indebtedness to the Bank, Zignego and Macomber in the order named.

About a week previous to this pledge agreement, on September 7th, 1950, the Diamond-S Ranch Co. filed a Certificate of Corporate Dissolution with the Secretary of State. On October 17th, 1950, Sam Wahyou bought from the Bank the Corbari note, on which there was a balance due of \$5,000.00, and the Bank assigned and delivered to him the Corbari note and the pledged Corbari stock consisting of 310 shares in the Diamond-S Ranch. [147]

On October 31st, 1950, Corbari, who had become indebted to Smeed during his lifetime in connection with the purchase of cattle, executed an assignment

to W. W. Lord, testamentary trustee for Smeed. The assignment was to secure the payment of \$15,041.34 plus interest, being the then amount of Corbari's indebtedness to the Smeed estate. The assignment to Lord, as one of the trustees for the Smeed Estate, contained the following recital:

“Now, therefore, in consideration of the premises, and to secure the payment of said indebtedness, I do hereby sell, assign, transfer and set over unto W. W. Lord, as Trustee, all my right, title and interest in and to all of my partnership interest in the assets of a certain partnership formed by reason of the dissolution of Diamond-S Ranch Co., a Nevada corporation, and in and to any profits arising from the operation of said partnership. I further state that I was the owner of 310 shares of stock in said Diamond-S Ranch Co., and that the total outstanding shares of stock in said company was 1,572½ shares, and that my interest in the partnership and the assets of the partnership formed in connection with the dissolution of said Company, is in the same proportion as was my holding of stock in the total outstanding issue thereof.”

It is to be noted that there was no indorsement or delivery of the Corbari stock certificates to Lord, the certificates having been delivered and pledged to, and retained by, the Bank as above recited.

The Corbari note to the Bank, together with the pledged stock, having been sold, assigned and delivered by the Bank to Wahyou, on October 17th, 1950, Wahyou, through his agent and attorney, Mac-

omber, noticed the pledged stock for pledgee's sale at public auction to be sold on May 21, 1951. Pursuant to said notice of sale the pledged Corbari stock, 310 shares, was sold on the 21st day of May, 1951, and purchased for the account of Wahyou for the sum of \$5,500.00.

On December 7, 1951, the Diamond-S Ranch Co., by and through its then stockholders, Corbari not being named as [148] such as Wahyou then owned his stock, filed a Certificate of Corporate Revival with the Secretary of State reinstating the corporation as of September 7th, 1950, which was the date of its prior dissolution.

The plaintiffs, trustees of the Smeed Estate, assert that at the time of the October 31, 1950, assignment to them by Corbari, or immediately prior thereto and while the matter of the assignment was under discussion, Corbari had represented to them that the Corbari stock was not subject to any outstanding lien or pledge. This is denied by Corbari as indicated by his deposition on file. In any event it would appear that the plaintiffs had notice of a lien against the stock some months prior to the October 31, 1950, assignment. See letter from W. W. Lord, trustee, to Corbari, of date March 25th, 1950, Exhibit 17, reading as follows:

“Dear Arch:

When you were here a few weeks ago, we made an agreement whereby we could get a second lien on the stock of your Nevada Corporation. This agreement was made at your suggestion and it

seemed to us, as trustees of the Smeed property, that it was as fair as could be considering our position.

We have now heard from a lawyer in California refusing the second lien and wanting the trustees to pay off the bank in California. We are in no position to do what he suggests and we are wondering if he misunderstood what we wanted to do or if you have changed your mind.

We are trying to close the estate and this is one of the few items to be determined. Please let us hear from you by return mail what to do.

Sincerely yours,

John W. Smeed Estate
By: W. W. Lord, Trustee."

Comment

On the basis of this factual situation the plaintiffs filed their original complaint in this Court on the 19th [149] day of August, 1952, filing an amended complaint on the 21st day of October, 1954. The amended complaint alleges that on December 31, 1948, Corbari executed his note to Smeed, and that at the time of the filing of the complaint Corbari owed the Smeed Estate \$14,291.34, plus various interest items. That on September 7, 1950, the

"defendant corporation filed with the Secretary of State of State of Nevada the papers necessary to effect a voluntary dissolution of said corporation under Section 1664 (64) of the code

of laws of the State of Nevada, (and) the Secretary issued the certificate therein provided for that said corporation was dissolved, and on that day said corporation was dissolved.”

That the then board of directors, including Corbari and Wahyou, became trustees of the corporation and of its assets. That the trustees failed to carry out their duties and wind up the affairs of the corporation but continued to actively operate its business. That on December 7, 1951, a Certificate of Revival or Renewal of Corporate Charter was filed with the Secretary of State. The Certificate recited the dissolution on September 7, 1950, and also that the corporation was

“carrying on the business permitted by Sections 65 and 66, Chapter 177, Statutes of Nevada of 1925, as amended, and desires to renew or continue through revival its existence* * * .”

To this certificate was attached a list of the then stockholders which list indicated that as of October 10, 1951, Corbari was not a stockholder. This, in view of the purchase of the Corbari stock at the sale of the pledged stock on May 21, 1951, was a correct statement.

In Count Three of their amended complaint, plaintiffs set-forth the theory on which they seek to impress a lien on the assets of the corporation, namely, that the entire [150] series of transactions whereby Wahyou purchased the Corbari-Bank of America note and received the pledged Corbari stock, were fraudulent and void as to the plaintiffs. That by the terms of Corbari's assignment to the

trustees of the Smeed Estate on October 31st, 1950, the trustees had acquired all of Corbari's interest in the assets of the dissolved Diamond-S Ranch Co. It is to be observed that prior to the date of this assignment, October 31, 1950, all of the Corbari stock which the Bank held as a pledge had been by the Bank delivered to Wahyou on the 17th of October, 1950, and that from that date on Wahyou held the stock as pledge until he acquired ownership by purchase at the pledge sale on May 21, 1951.

Plaintiffs say that as one of the directors of the Company at the time of dissolution on September 7, 1950, Wahyou became a trustee for the stockholders and creditors of the corporation; that by reason thereof a fiduciary relationship existed between him and Corbari and the creditors, and that while he was acting as trustee for the purpose of winding up the affairs of the dissolved corporation he could not trade in the Corbari stock for his own benefit; that Corbari, Wahyou, and Macomber conspired to defraud the plaintiffs of the benefits accruing to them by virtue of the assignment of October 31, 1950.

Plaintiffs by their amended complaint pray (1) for judgment against A. E. Corbari and his wife for the balance due on their note executed to Smeed, being \$14,291.34 together with several items of interest; (2) that the Court decree the plaintiffs to have a share in the assets of the corporation in proportion to the percentage that the 310 shares of Corbari stock bears to the total issued stock of 1572½ shares; (3) that all the remaining stockholders, [151] officers and statutory trustees of the

corporation account for any and all property and profits coming into their hands since the date of dissolution, September 7, 1950; (4) that the Court impress a lien against all of the corporate property for the payment of the balance of principal and interest due on the Corbari-Smeed note; (5) that the assets of the corporation be sold and the plaintiffs paid from the moneys received; (6) and that plaintiffs have personal judgment, jointly and severally, against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang, for the sum of \$14,291.34 balance due on the Corbari-Smeed note, plus the various items of interest.

The Issues

The pre-trial order, referring to the issues presented by the pleadings states as follows:

“The issues are, as to the first cause of action, whether an additional one thousand dollars should be credited upon the Corbari-Smeed note; as to the remaining counts whether or not the admitted facts are sufficient to create a lien against the assets of Diamond-S Ranch Co., be it presently existing as a corporation, or dissolved and its assets being presently held by its last board of directors as trustees in dissolution.”

First Cause of Action

As to the first cause of action, being against the defendants A. E. Corbari and Marie Corbari, the Court finds that these defendants are indebted to

the Smeed Estate in the amounts set-forth in Paragraph VI of the amended complaint, namely, for the sum of \$14,291.34, plus interest at 5% per annum on the sum of \$15,041.34 from December 31, 1948, to December 31, 1949, plus interest on \$15,041.34 at 8% per annum from December 31, 1949, until November 22, 1950, plus interest on \$14,291.34 at 8% per annum from November 22, 1950, until paid, plus a reasonable attorney [152] fee which the Court fixes at ten (10%) percent of the total amount of principal and interest.

During the pre-trial there was some controversy as to whether Corbari had been given credit for an additional \$1,000.00 payment on the note for which he had received no credit. In this connection the pre-trial order required the parties to submit further proof on this point.

Pursuant to this requirement the affidavit of W. W. Lord, one of the plaintiffs, was filed herein on the 3rd day of June, 1955, and the statements therein made by Lord stand uncontradicted. It is indicated that the confusion as to the \$1,000.00 payment arose by reason of Corbari having given a \$1,000.00 check as a payment on the note which check was dishonored for lack of sufficient funds to pay the same, thus creating a situation where Corbari was entitled to no credit on his note. The Court finds these matters as set-out in the Lord affidavit to be true.

It is to be observed that plaintiffs pray for a judgment on the Corbari note against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin,

Toon and Jang. The first cause of action being an action on the note does not concern the defendants other than Corbari and his wife, and plaintiffs are not entitled to a judgment against any of the other defendants named.

Second Cause of Action

This cause of action has to do with the legal effect of the dissolution and reinstatement of Diamond-S Ranch Co. under Section 1664 (64), N.C.L., 1929. Plaintiffs have no quarrel with the legal procedure by which the dissolution came about or the reviver was invoked, but assert that after the dissolution the members of the last board of directors became statutory trustees with power only to wind [153] up and terminate the affairs of the dissolved corporation, and that such power went no further than to dispose of the corporate assets, make payment to the creditors, and thereafter make a pro-rata distribution to the stockholders of any remaining money or assets. The plaintiffs assert that instead of winding up the affairs of the dissolved corporation the directors-trustees continued to operate the business of the corporation as a going concern and to all intents and purposes as though it had never been dissolved.

Plaintiffs further urge that the attempted revival of the dissolved corporation was fraudulent for the reason that the "Appointment of Agents," being an affidavit filed with the Secretary of State in connection with the revival proceedings, was false and fraudulent in that whereas it stated that the filing

of the certificate for revival was authorized by the unanimous consent of all of the stockholders such was not the fact; that as a matter of law there were no stockholders, in a legal sense, after the date of dissolution, and in any event the affidavit did not list Corbari as the owner of 310 shares of stock.

Plaintiffs further urge that the affidavit failed to disclose the consent of the successors in interest of the Corbari stock to the revival proceedings, at the same time admitting that the Corbari stock was included in the designation of number of shares of stock owned by Wahyou, his ownership being listed as 631 shares which was 310 shares (amount of Corbari's stock) in addition to his original ownership of 321 shares. Plaintiffs contention in this respect is based upon their major premise that all of the actions of the directors-trustees after September 7th, 1950, date of dissolution, were fraudulent and void, and that all of the acts whereby Wahyou obtained the Corbari stock were [154] fraudulent and void, and were all a part of a conspiracy to defraud the plaintiffs of the rights acquired by them under the Corbari-Lord assignment of October 31, 1950.

The Court finds that the defendant Wahyou lawfully acquired the Corbari stock, and that all legal requirements were observed in the dissolution and revival of the corporation, and therefore finds against the plaintiffs on Count Two of the complaint.

Third Cause of Action

This count is based on the proposition that the entire series of acts by which Wahyou obtained the

Corbari stock were conceived in fraud, and executed in furtherance thereof. The Court is unable to find any evidence of fraud and holds that by virtue of the purchase of the Corbari stock at the sale of pledged property, May 21, 1951, Wahyou became the owner of, and entitled to, all of the benefits represented by the Corbari stock; that such sale and the acquiring of the Corbari stock by Wahyou, then a creditor of Corbari to the extent of some \$12,-000.00, was but the normal and rational procedure to be followed by one in his position; that in connection therewith he breached no fiduciary relation to the plaintiffs, defendants, or any of the other creditors of the corporation; that the acts complained of were not tinged with fraud as against plaintiffs and/or any of the creditors of the corporation; and that any rights that the plaintiffs may have had in or to said stock, or in or to a proportional share in the assets of the corporation, were extinguished by sale of pledged property on May 21, 1951.

In this connection, and before proceeding further, the Court will note the plaintiffs' claim that (1) at the time Corbari made his assignment to Lord, October 31, 1950, he [155] represented to the trustees that the stock was clear of liens. This Corbari denied, and it is evident from Lord's letter to Corbari dated March 25, 1950, that Lord knew of a prior assignment and/or pledge of the Corbari stock several months prior to Corbari's assignment to him. The Court takes the position that this knowledge continued up to and including the date

of the execution and delivery of the assignment. In any event it was sufficiently close to that occasion to have put plaintiffs, as reasonably prudent persons, on notice that there was sufficient reason to question the status of the stock, and to merit further inquiry on their part. Had they inquired, the true status of the stock could have been easily ascertained. In any event a false representation by Corbari to Lord made in connection with the assignment would not be binding on Wahyou unless it could be shown that Wahyou also had knowledge of such false representation and thereafter by his conduct in connection with the sale of the pledged stock he became party to a conspiracy, as plaintiffs allege, to defraud the plaintiffs.

Based on the depositions on file herein, and particularly the deposition of Corbari and Wahyou, the Court finds that Corbari did not represent to Lord that the stock was "in the clear", but in any event if such a statement was made the Court finds that it was not relied upon by the plaintiffs. They appear to have taken the assignment for what it was worth to add security to a then existing debt evidenced by the unsecured note of date December 31, 1948, in the amount of \$15,041.34, and with knowledge that Corbari was in a "bad way" financially, thus indicating that they felt they should take every precaution to secure the Smeed indebtedness and note, and inquire afterward. That this [156] was the thought of plaintiffs is borne out by the wording of the assignment prepared by plaintiffs' attorney wherein no specific reference is made to

the stock, and also by the fact that plaintiffs did not demand, obtain or get, an actual physical delivery of the Corbari stock certificates.

The Court further finds that there is no proof that Wahyou, at the time of the purchase of the stock at the pledge sale had any knowledge of the Corbari assignment to Lord, as trustee for the Smeed Estate, nor of any representation, true or false, made by Corbari to Lord in connection therewith.

The Court further finds that there was no fraud on the part of any of the defendants named in connection with any of the acts by them performed, as complained of in the complaint, including the dissolution and revival of the corporation, and the acts and transactions in connection with the acquisition of the Corbari stock by Wahyou.

Fourth Cause of Action

What has been heretofor said will dispose of the contentions made by plaintiffs in Count Four of their amended complaint.

Conclusions of Law

As conclusions of law based upon the foregoing finding of facts the Court concludes:

1. That no genuine question of fact exists as to the First Cause of Action and that plaintiffs are entitled to summary judgment against A. E. Corbari and Marie Corbari on said First Cause of Action for the amount of principal and interest due on the Corbari note to Smeed of date Decem-

ber 31, 1948, as alleged in Paragraph VI of plaintiffs' amended complaint, together with an attorney fee in connection therewith in an amount equal to 10% of the total [157] amount of principal and interest.

2. That the defendants are entitled to a summary judgment against the plaintiffs upon said Counts Two, Three and Four of the amended complaint.

It is therefore ordered that plaintiffs' motion for summary judgment as to the First Count of their amended complaint, be and it is hereby granted, and that defendants' motion for summary judgment on said Count be denied.

It is further ordered that the defendants' motion for summary judgment as to the Second, Third and Fourth Counts of the Amended Complaint, be, and it is hereby granted, and that the plaintiffs' motion for summary judgment on said Counts is hereby denied.

It is further ordered that the plaintiffs shall have judgment against the defendants Archie E. Corbari and Marie Corbari for their costs, and that the defendants, except Archie E. Corbari and Marie Corbari, shall have judgment against plaintiffs for their costs.

Let judgment be entered accordingly.

Dated at Carson City, Nevada, this 11th day of August, 1955.

/s/ JOHN R. ROSS,

United States District Judge. [158]

[Endorsed]: Filed Aug. 11, 1955.

[Title of District Court and Cause.]

CERTIFIED COPY OF DOCKET ENTRY OF
AUGUST 11, 1955

Filing and Entering Opinion and Decision on
Motions for Summary Judgment.

Entering Judgment: Judgment, It is therefore
Ordered that Plaintiffs motion for Summary Judgment
as to the First Count of their Amended Complaint,
be and it is hereby granted and that Defendants
Motion for Summary Judgment on said Count be
denied.

It Is Further Ordered that the Defendants motion
for Summary Judgment as to the Second, Third and
Fourth Counts of the Amended Complaint, be, and
it is hereby granted and that Plaintiff's motion
for Summary Judgment on said Counts is hereby
denied.

It Is Further Ordered that the Plaintiffs shall
have judgment against the defendants Archie E.
Corbari and Marie Corbari for their costs and
that the defendants except Archie E. Corbari and
Marie Corbari, shall have judgment against
plaintiffs for their costs. Let judgment be entered
accordingly.

August 11, 1955. Counsel notified this day of
above entries.

Attest: A true and correct copy.

[Seal] /s/ OLIVER F. PRATT,
Clerk

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, Trustees of John W. Smeed Estate, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment of this Court denying plaintiffs' motion for Summary Judgment as to the Second, Third and Fourth Counts of the Amended Complaint and granting the motion for Summary Judgment of defendants Sam Wahyou, Diamond-S Ranch Co., Sam Wahyou, K. R. Nutting, and Thomas G. Lee, as trustees for the assets of [163] Diamond-S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, and Herbert Jang, otherwise known as Herbert Jong, as to the Second, Third and Fourth Counts of the Amended Complaint, said judgment having been entered in this action on August 11, 1955.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs

Acknowledgment of Service attached. [164]

[Endorsed]: Filed September 9, 1955.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents that, Whereas, the plaintiffs above named have filed their Notice of Appeal from certain portions of that Judgment entered in the above-entitled Court on August 11, 1955, all as more particularly appears in said Notice of Appeal filed with the Clerk of the above-entitled Court on this date,

Now, Therefore, in consideration of the premises, the undersigned, United States Fidelity and Guaranty Company, a corporation duly organized and doing business under and by virtue of the State of Maryland, and authorized to do business in the State of Nevada, and duly licensed therein for the purposes of making, [165] guaranteeing and becoming sole surety upon bonds and undertakings, does hereby undertake, through its undersigned duly authorized and empowered agent and representative, and the condition of this bond is that if the said appeal by plaintiffs is dismissed or the Judgment affirmed or if the appellate Court modifies said Judgment and awards costs against the plaintiffs, and if the said plaintiffs shall pay the amount of such costs, then this bond is void, otherwise to be and remain in full force and effect, in the sum of Two Hundred Fifty Dollars (\$250.00), in which amount the undersigned is bound to pay the defendants.

Dated this 7th day of September, 1955.

UNITED STATES FIDELITY &
GUARANTY COMPANY,

[Seal] /s/ LLOYD S. HOBRON,

Attorney-in-Fact

BISBY-McKNIGHT INSURANCE
& REAL ESTATE, INC.,

[Seal] /s/ LLOYD S. HOBRON,

Resident Agent

Notary's Certificate attached.

Acknowledgment of Service attached. [166]

[Endorsed]: Filed September 9, 1955.

[Title of District Court and Cause.]

APPELLANTS' STATEMENT OF POINTS

Pursuant to Rule 17 (6) of the Rules of the above entitled Court, appellants do hereby make the following statement of points upon which they intend to rely on appeal:

1. The Court erred in denying plaintiffs' Motion for Summary Judgment as to the Second, Third and Fourth Counts of the Amended Complaint.

2. The Court erred in granting the Motion for Summary Judgment of defendants, Sam Wahyou, Diamond-S [160] Ranch Co., Sam Wahyou, K. R. Nutting and Thomas G. Lee, as trustees for the assets of Diamond-S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, and Herbert Jang, otherwise known as Herbert

Jong, as to the Second, Third and Fourth Counts of the Amended Complaint.

3. The Court erred in making its Findings of Fact as to the Second, Third and Fourth Causes of Action of the first amended complaint, and such Findings of Fact are against the weight of the evidence, in conflict with the admitted facts, and are clearly erroneous.

4. The Court erred in making its Conclusion of Law No. 2 wherein it found as a Conclusion of Law that defendants are entitled to a summary judgment against the plaintiffs upon Counts Two, Three and Four of the first amended complaint.

5. The Court erred in failing to find as a fact that the defendant, Sam Wahyou, at the time of his purchase of the Corbari stock, was a trustee of the assets of the then dissolved Diamond-S Ranch Co., and as such trustee had the duty of caring for and holding the assets of the Ranch Company for the benefit of his fellow stockholders and their assignees.

6. The Court erred in failing to find as a Conclusion of Law that plaintiffs were entitled to Summary Judgment against the defendants as to the Second, Third and Fourth counts of the first amended complaint. [161]

7. The Court erred in failing to find that as a result of the Corbari assignment to the plaintiffs that the plaintiffs acquired an interest in the assets of the dissolved Diamond-S Ranch Co.

8. The Court erred in finding that the sale of the

certificate of stock in the Diamond-S Ranch Co. was a valid sale.

9. The Court erred in failing to find that there was constructive fraud in the sale of stock to Wahyou.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs

Acknowledgment of Service attached. [162]

[Endorsed]: Filed October 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 6th day of October, A. D. 1955.

[Seal] /s/ OLIVER F. PRATT,
Clerk [216]

[Endorsed]: No. 14902. United States Court of Appeals for the Ninth Circuit. G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus and Jack Smeed, Trustees of John W. Smeed Estate, Appellants, vs. Sam Wahyou, Diamond-S Ranch Co., Sam Wahyou, R. K. Nutting and Thomas G. Lee, as Trustees for the assets of Diamond-S Ranch Co., Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: October 17, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14902

G. A. MILLER, et al., Plaintiffs,
vs.

ARCHIE E. CORBARI, otherwise known as A. E.
CORBARI, et al., Appellees.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Pursuant to Rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, appellants do hereby adopt the Statement of Points Upon Which Appellants Intend to Rely on Appeal and the Designation of Contents of Record on Appeal and Supplement to Designation of Contents of Record on Appeal heretofore filed, and appearing in the typewritten transcript of record, as their Statement of Points upon which they intend to rely on appeal and designation of contents of record on appeal.

PIKE & McLAUGHLIN,
SMITH & EWING,
CARVER, McCLENAHAN &
GREENFIELD,

/s/ By MILES N. PIKE,
Attorneys for Plaintiffs

[Endorsed]: Filed November 10, 1955. Paul P.
O'Brien, Clerk.

United States
Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED, L. H.
STAUS and JACK SMEED, Trustees of John W.
Smeed Estate,

APPELLANTS,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE, as Trustees for the assets of Diamond-S
Ranch Co., THOMAS G. LEE, TOY QUONG, JOE
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FEB - 6 1935

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*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA*

I

STATEMENT OF JURISDICTION

Appellants, G. A. Miller, W. W. Lord, Ralph Smeed, L. H. Staus, and Jack Smeed, Trustees of John W. Smeed Estate, commenced this action as plaintiffs against A. E. Corbari and Marie Corbari, husband and wife, Sam Wahyou, Diamond-S Ranch Co., a Nevada corporation, and K. R. Nutting, Thomas G. Lee, Sam Wahyou, and A. E. Corbari, as trustees for said corporation, asking for a money judgment against the defendants A. E. and Marie Corbari,

praying that the assets of the defendant Diamond-S Ranch Co. be impressed with an equitable lien in favor of plaintiffs to secure the moneys alleged to be owed plaintiffs by the defendants A. E. and Marie Corbari, and, alternatively, for a money judgment against the defendant Sam Wahyou for the full amount of any money found due and owing plaintiffs from the defendants A. E. and Marie Corbari, including interest, attorneys' fees and costs. Thereafter, on October 21, 1954, plaintiffs filed an amended complaint (25) against Archie E. Corbari, Marie Corbari, Sam Wahyou, Diamond S. Ranch Co., a corporation, Forrest E. Macomber, A. E. Corbari, Sam Wahyou, K. R. Nutting, and Thomas G. Lee, as trustees for the assets of the Diamond S. Ranch Co, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon, Herbert Jang, otherwise known as Herbert Jong, and D. W. Zignego. The relief demanded (34, 35) consisted of a money judgment against the defendants Corbari, that a receiver be appointed to take over the assets of the Diamond S. Ranch Co, that plaintiffs be decreed a proportionate interest in the assets of the Diamond S. Ranch Co., for an accounting, that the defendants be enjoined from disposing of any of the assets of the Diamond S. Ranch Co., for an order directing that the property and assets of the Diamond S. Ranch Co. be sold and plaintiffs paid from the proceeds of the sale, and that plaintiffs have judgment against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang (or Jong), and each of them, for payment of the obligation due and owing plaintiffs.

All defendants thereafter answered to the Amended Complaint, (41, 51, 57) but the action against the defendants D. W. Zignego and Forrest E. Macomber was dismissed by virtue of the pre-trial order of the District Judge dated January 18, 1955 (130).*

Both plaintiffs and defendants ** filed motions for Summary Judgment. The District Court, on August 11, 1955 (153), entered judgment in favor of plaintiffs as to the First Count of their amended complaint, against plaintiffs and in favor of defendants as to the Second, Third and Fourth Counts of the amended complaint, in favor of plaintiffs and against the defendants A. E. and Marie Corbari for costs, and in favor of all defendants except A. E. and Marie Corbari, and against plaintiffs, for the costs of those defendants. From this judgment plaintiffs appealed to this Court, and Notice of Appeal was filed on September 9, 1955 (154).

Plaintiffs are citizens of the State of Idaho. The defendants A. E. and Marie Corbari are citizens of the State of Nevada. The defendant Sam Wahyou, individually and as trustee, is a citizen of the State of California. The Diamond S. Ranch Co. was incorporated under the laws of the State of Nevada with its principal place of business at Galconda, Nevada, and if it exists at all is a citizen of the State of Nevada. The defendants Nutting and Lee, individually and as trustees, are citizens of the State

* Arabic Numerals in parenthesis refer to pages of the Transcript of Record.

** The parties will be referred to as plaintiffs and defendants in this brief.

of California. The defendant Macomber is a citizen of the State of California. The defendants Quong, Sin, Toon, Jang (or Jong), and Zignego are citizens of the State of California.

The amount here in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3000.00).

The District Court's jurisdiction in the action was based on Title 28, U.S.C.A., Sections 1332 and 1655. This Court has jurisdiction to determine this appeal under Title 28, U.S.C.A., Section 1291, and Rule 73, Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

The facts in this case show that on or about December 31, 1948, the defendants A. E. Corbari and Marie Corbari made, executed and delivered to plaintiffs' decedent their promissory note in the amount of \$15,041.34 (Tr. page 8), which amount with interest, except a payment of \$750.00 remains due, owing and unpaid (146).

Thereafter, on or about the 22nd day of February, 1950, A. E. Corbari agreed with the plaintiffs that he would assign to plaintiffs as security for the payment of said note all of his interest in the Diamond S. Ranch Company, in which he owned 310 of 1572½ shares outstanding (69). Following this agreement to assign, specifically on the 7th day of September, 1950, the directors of the Diamond S. Ranch Company, with the aid of Forrest Macomber, their at-

torney, effected a voluntary dissolution of the Diamond S Ranch Company under the laws of the State of Nevada (72, and Pre-trial Exhibit No. 8). Thereafter, on October 31, 1950, A. E. Corbari and Marie Corbari executed formal assignment (84 and 85) of all their right, title and interest in and to the assets of the Diamond S. Ranch Company, then dissolved, to plaintiffs.

Following the voluntary dissolution of the Diamond S. Ranch Company on September 7, 1950, the directors of the company, trustees under the statutes of Nevada, did not wind up the affairs of the corporation and distribute the assets as required to do by the laws of Nevada. Instead, they operated the corporation exactly as theretofore and continued to do so until the charter was attempted to be revived in December, 1951 (72), without recognizing any interest in Corbari or in these plaintiffs.

Other pertinent facts are that on January 4, 1949, Corbari delivered to the Bank of America his 310 shares of stock in the Diamond S. Ranch Company, a Nevada corporation, endorsed in blank (Pre-trial Exhibit No. 1), as security for the payment of an obligation to the Bank, and at the same time executed a general pledge agreement to the Bank (106, 107, 108). On September 18, 1950, this pledge agreement was replaced with a new pledge executed by Corbari to the Bank of America (108 and Pre-trial Exhibit 2), to secure the obligation owing to the Bank of America covered by the first pledge, and to further secure obligations owing to one Zignego and attorney

Macomber. This second pledge was executed subsequent to the agreement to assign to Smeed of February 22, 1950, and subsequent to the dissolution of the corporation. Thereafter, on October 17, 1950, the Bank of America sold to the defendant Sam Wahyou Corbari's note (48, 70, and 126) and the September 18, 1950, pledge (106), in consideration of the payment by Wahyou of the balance due on Corbari's note to the Bank in the amount of \$5000.00, plus interest. On February 9, 1951, Forrest Macomber, acting as attorney for Corbari and at the same time being the legally retained counsel for the Diamond S. Ranch Co. and for Sam Wahyou personally, wrote plaintiffs, offering to settle the obligation due them and secured by the assignment, for the sum of \$5000.00 (page 99), which offer was rejected. On March 27, 1951, plaintiffs' assignment of October 31, 1950, was recorded among the land records of Humboldt County, Nevada, the county in which the real property assets of Diamond S Ranch Co. are located (12).

On May 14, 1951 (Pre-trial Exhibit No. 4), the defendant Sam Wahyou signed a notice of sale of the stock of the Diamond S. Ranch Co. previously held by Corbari, to take place on May 21, 1951, and in that notice recited that the sale was for the purpose of foreclosing a July 10, 1950, pledge of Corbari to the Bank of America which Wahyou had acquired. It should be here noted that the pledge referred to in the notice of sale can only be the second pledge agreement dated September 18, 1950 (Pre-trial Exhibit No. 2), and it should be further noted in that agree-

ment that the date of July 10, 1950, is the date of the note being secured by the pledge, whereas the date of September 18, 1950, is the actual date of the pledge.

On May 21, 1951, the sale of the stock was made to one Gordon J. Aulik, an associate of Forrest Macomber, acting for and on behalf of Sam Wahyou (107). The sale was conducted by Forrest Macomber, the attorney for Sam Wahyou, Corbari, and the Diamond S. Ranch Co. Plaintiffs received no notice of this sale.

Following all of the transactions hereinbefore set forth, on October 10, 1951, the stockholders of the Diamond S Ranch Company executed Appointment of Agent to revive the corporation, appointing Wahyou, Nutting and Lee as such agents (Pre-trial Exhibit 9). This instrument recited that defendants Wahyou, Nutting, Lee, Jang, Quong, Sin and Toon were holders of all of the stock and that Wahyou owned 631 shares. It should be noted that at dissolution Wahyou owned 321 shares, the difference being the Corbari stock.

On October 10, 1951, said agents executed under oath a Certificate of Revival or Renewal (Pre-trial Exhibit 9), in which it was stated that the corporation had been carrying on its business since the date of its dissolution. On December 7, 1951, the certificate was filed with the Secretary of State of the State of Nevada (Pre-trial Exhibit 9), and on April 4, 1952, the Secretary of State issued his certificate of renewal (Pre-trial Exhibit 9).

III

SPECIFICATION OF ERRORS

1. The lower court erred in finding as a matter of fact that there was no endorsement or delivery of the Corbari stock certificates to Lord, following the execution of the Corbari assignment, in that at the time of the execution of the assignment the Diamond S Ranch Co., was in dissolution and the certificates of stock of the dissolved corporation were no longer evidence of ownership in said dissolved corporation.

2. The lower court erred in finding as a matter of fact that on December 7, 1951, the date on which the Diamond S. Ranch Co. filed a Certificate of Corporate Revival, the defendant Wahyou then owned the Corbari stock, in that Wahyou could not have acquired ownership of the Corbari stock by purchase at a foreclosure sale during the period of corporate dissolution.

3. The lower court erred in not finding as a fact that throughout the period of corporate dissolution the defendant Wahyou was a trustee of the assets of the corporation, and that his purported purchase of the Corbari stock during dissolution and his subsequent assertion of ownership and control of said stock constituted a conversion to himself of the assets of said corporation which he was bound to hold in trust for the stockholders and their assignees.

4. The lower court erred in finding as a fact that the defendant Wahyou lawfully acquired the Corbari stock, and that all legal requirements were observed in the dissolution and revival of the corporation.

5. The lower court erred in finding that the plaintiffs were on notice and should have questioned the status of the Corbari stock, in that at the time the assignment was executed the corporation was in dissolution and the title to all of the property was in the trustees for the benefit of the former stockholders, assignees and creditors.

6. The lower court erred in finding that Wahyou had no knowledge of the assignment at the time he purchased the stock certificates at foreclosure, in that the Smeed assignment was a matter of record in Humboldt County, Nevada, the situs of the ranch property, and Wahyou, as trustee of the dissolved corporation, had constructive notice, at least, of the assignment.

7. The lower court erred in not finding as a fact that Wahyou and Corbari conspired, by and through their joint attorney, Macomber, to defraud plaintiffs.

8. The lower court erred in granting the Motion for Summary Judgment of defendants as to the Second, Third and Fourth Counts of the amended complaint.

9. The lower court erred in failing to grant plaintiffs' Motion for Summary Judgment as to the Second, Third and Fourth Counts of the amended complaint.

IV

ARGUMENT

1. A summary judgment should be rendered if the pleadings, depositions, admissions and proceedings

heretofore had in the action show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56, Federal Rules of Civil Procedure

3 Moore's Federal Practice, 3171, et seq, Summary Judgment, Chapter 56

2. The attempted revival of this corporation was invalid and without legal effect as to these plaintiffs, and as far as they are concerned, the Diamond-S Ranch Co. is now and ever since dissolution has been without corporate existence.

(A) When this corporation voluntarily dissolved, its assets became the property of its stockholders as tenants in common and it had no right to continue business as a corporation except to wind up its affairs. The statute expressly forbid it to do so.

The pertinent parts of the Nevada statute supporting this proposition are as follows: (Emphasis supplied)

"Sec. 1664. Expired, Dissolved, Corporations Remain Bodies Corporate Three Years for Certain Purposes.

"Sec. 65. All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless for the term of three years from such expiration or dissolution be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock,

but not for the purpose of continuing business for which said corporation shall have been established."

"Sec. 1665. Directors, as Trustees, to Settle Affairs of Dissolved or Expired Corporations; Dissenting Stockholders' Rights.

"Sec. 66. Upon the dissolution of any corporation under the provisions of section 64 of this act, or upon the expiration of the period of its corporate existence, limited by its certificate or articles of incorporation, the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell, and convey the property, real and personal, and divide the moneys and other property among the stockholders, after paying or adequately providing for the payment of its liabilities and obligations; * * *."

* * *

"Sec. 1667. Powers of Court in Event of Dissolution or Expiration of Corporate Existence.

"Sec. 68. When any corporation organized under this chapter shall be dissolved or cease to exist in any manner whatever, the district court, on application of any creditor or stockholder of such corporation, at any time, may either continue such directors, trustees as aforesaid, or appoint one or more persons to be receivers of and for such corporation, to take charge of the estate and effects thereof, and to collect the

debts and property due and belonging to the company, with power to prosecute and defend, in the name of the corporation, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of said trustees or receivers may be continued as long as the district court shall think necessary for the purposes aforesaid."

13 Am. Jur., Corporations, Sec. 1352, page 1198,
note 9.

47 A.L.R. 1359, 1360, Note 17

97 A.L.R. 479 and 480.

"A dissolution of a private corporation entirely changes the character of the property interest of its stockholders. It destroys their stock as such and under the modern equitable view substitutes the thing which their stock represented—that is, an interest in the corporate property. Indeed, there is ample authority for the doctrine that the stockholders of a corporation, when its existence ceases, become vested with a legal title to its property as tenants in common."

13 Am. Jur., Corporations,
Sec. 1352, page 1198

Supplemental authorities:

Re Midwest Athletic Club (CCA 7, Ill.)

161 Fed. (2) 1005

Re Horse Heaven Irr. District

11 Wash. (2d) 218

118 P. (2d) 972

First National Bank vs. State of Maine

284 U.S. 312

76 L. Ed. 313

52 S. Ct. 174

77 A.L.R. 1401 (recognizing rule)

Pewabic Mining Co. vs. Mason

145 U. S. 349

36 L. Ed. 732

12 S. Ct. 887

Stearns Coal & Lumber Co. vs. Van Winkle
(1915)

137 CCA 314

221 F. 590

On Den. 241 U.S. 670

60 L. Ed. 1230

36 S. Ct. Rep. 554

Service & Wright Lumber Co. vs. Sumpter
Valley Ry. Co. (1915)

81 Ore. 32

149 Pac. 531

152 P. 262 (on re-hearing)

158 P. 175 (on re-hearing)

(B) The vested rights of the stockholders would be impaired if the Legislature undertook to recreate a corporation after legal dissolution without the consent of a former stockholder who diligently asserted his rights. This is prohibited by both State and Federal constitutions.

Rossi vs. Caire

186 Cal. 544

199 Pac. 1042

National Surety Co. of N. Y. vs. Cobb

66 F. (2d) 323

Hollingsworth v. Multa Trina Ditch Co.

51 F. (2d) 649

In re Booth's Drug Store, Inc.

19 F. Supp. 95

Trower vs. Stonebraker-Zea Live Stock Co.

17 F. Supp. 687

In re 211 East Delaware Place Bldg. Corp.

7 F. Supp. 892

Denman vs. Richardson

284 Fed. 592

(C) When this corporation continued doing business as usual and in defiance of the express provisions of the statute, those who did so acted as partners. Its directors became trustees for the former stockholders and dealt with the assets as fiduciaries of Corbari, his assignees, and the other stockholders.

Quoting from Nevada Statutes:

“Sec. 1669. Trustees or Receivers to Distribute Funds of Corporation, when.

“Sec. 70. The said trustees or receivers, after payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, shall pay the other debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not, they shall distribute the same ratably among all the creditors who shall prove their debts in the manner that shall be directed by an order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of such debts and necessary expenses (or the making of adequate provision therefor), *they shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders of the corporation or their legal representatives.*”

Trustees have no legal title to assets of the dissolved corporation, such title vested in stockholders. Trustees have possession with power of sale and when debts are paid stockholders have right to possession.

Wells Fargo Bank & Union Tr. Co. vs.
Blair (1928)

58 App. D. C. 160

26 Fed. (2d) 532

Rossi vs. Caire

186 Cal. 544

199 Pac. 1042

The general effect of statutes designating or providing for the appointment of trustees for dissolved corporations is to constitute the property and rights of the dissolved corporation a trust fund to be administered by the trustees for the purposes specified by the legislature.

13 Am. Jur., Sec. 1359, page 1202

Anno. 47 A.L.R. 1356, 1357, 1358

Supplemental in 97 A.L.R. 486

The duty of these trustees is to dispose of the company's property, collect all its credits, pay its debts, and distribute the balance among the stockholders.

19 C.J.S., page 1511, note 12

Stuart vs. Chaney

71 Colo. 279

206 Pac. 386

242 Pac. 638

78 Colo. 421

In *Bacon vs. Robertson* (1855) 18 How. 480, 15 L. Ed. 499, 503, 504, the Supreme Court held that the rights of a stockholder in a dissolved corporation are not inferior to those of creditors, and that a trustee's duties are to maintain their (stockholders) rights to consult their advantage, citing *Willison vs. Watkins* (1830), 3 Pet. (U.S.) 43, 7 L. Ed. 596, and *Willis Trustees*, 125, 172, 173.

(D) The dissolved corporation being in the nature of a partnership, having no stockholders or directors and being under a statutory inhibition to do any business except to wind up its affairs, there was no power in the former stockholders and directors to hold meetings authorizing instruments of revival, no power to do the business necessary to a revival, and no right to apply for the same; the issuance of the certificate of revival by the Secretary of State was invalid and without authority of law and there has never been any revival of this corporation.

“Sec. 1692. Renewal or Revival of Corporate Charter; Procedure to Accomplish.

“Sec. 93. Any corporation heretofore, or now, existing under the laws of this state may at any time procure a renewal or revival of its charter for any period, together with all the rights, franchises, privileges and immunities, and subject to all its existing and pre-existing debts, duties, and liabilities secured or imposed by its original charter and amendments thereto, or existing charter, by filing a certificate with the secretary of state, which certificate shall set forth:

* * *

“5. *That the corporation desiring to renew or revive, and so renewing or reviving, its charter is, or has been, duly organized and carrying on the business authorized by its existing or original charter and amendments thereto, and desires to renew or continue through revival its*

existence under and pursuant to and subject to the provisions of this act."

It will be observed that a jurisdictional requirement to revival is the certificate that the corporation has been "duly carrying on the business authorized by its charter;" and that it was impossible for this corporation to duly carry on the business authorized by its charter after dissolution because of the prohibition provided by law.

Apart from statutes extending the existence of, or conferring powers upon, corporations for the purpose of winding up their affairs, the dissolution of a corporation implies the termination of its existence and its utter extinction and obliteration as an entity or body in favor of which obligations exist or accrue or upon which liabilities may be imposed.

13 Am. Jur., Corporations, Sec. 1342, page 1191

Oklahoma Natural Gas Co. vs. Oklahoma

273 U. S. 257

71 L. Ed. 634

47 S. Ct. 391

First National Bank of Selma vs. Colby

(Attachment dissolved)

21 Wall (U. S.) 609

22 L. Ed. 687

G. M. Standifer Const. Co. vs. Com. of I.R.

(CCA 9)

78 Fed. (2d) 285

In the Oklahoma Gas Co. case, *supra*, the Supreme Court held that an action against a dissolved corporation abated with dissolution. It is well settled that at common law "a corporation is dissolved as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect.

"But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there be some statutory authority for the prolongation."

During the extension allowed by statute a corporation

"has no power to borrow money or continue its ordinary business, except for the purpose of winding up its affairs; and it has no power to form a new company or amend its articles of incorporation."

13 Am. Jur., Corporations, Sec. 1366, p. 1207

Anno. 47 A.L.R. 1548

97 A.L.R. 496

During the period of statutory extension of life of a dissolved corporation it is not authorized to continue the business for which it was established nor to engage in any new business transactions.

16 Fletcher, Penn. Ed., Sec. 8170, page 937

U. S. vs. Bates Valve Bag Corp. 39 Fed (2d) 162

In re Int'l. Sugar Feed Co. 23 F. Supp. 197

At page 200 of this latter case, in discussing the right of a dissolved corporation to file a petition in voluntary bankruptcy and the effect of a continuation statute similar to ours:

“Moreover an extinct corporation can hardly be revived as provided in Section 56. That provision imports something of continued corporate entity.”

During the period of extension a corporation has no power to form a new corporation or amend its articles of incorporation.

13 Am. Jur. Sec. 1366

47 A.L.R. 1548, citing: No power to form new corporation: *Mason vs. Pewabic Min. Co.* (1885; C.C.) 25 F. 882, affirmed in (1890) 133 U. S. 50, 33 L. Ed. 524, 10 Sup. Ct. Rep. 234, and see *Greenwood vs. Union Freight R. Co.* (1881), 105 U.S. 13, 26 L. Ed. 961, holding it can originate no new transactions dependent upon its charter.

Where corporation had ceased to exist no corporate powers could be exercised by it except the winding up of its affairs.

James vs. Unknown Trustees (Okla.)
220 Pac. (2d) 831

Rossi vs. Caire
199 Pac. 1042

Holding of a meeting of members after dissolution held to be invalid.

47 A.L.R. 1376

Butler vs. Beach (1909)

82 Conn. 417

74 Atl. 748

Institution of statutory proceedings for extension of corporate existence held to be invalid where taken after dissolution.

Merges vs. Altenbrand (1912)

45 Mont. 355

123 Pac. 21

Rossi vs. Caire

199 Pac. 1042

3. Whatever may have been the legal effect of the effort of this company to revive its corporate existence, the revival statute cannot give validity to invalid acts done during dissolution nor can it deprive these plaintiffs of rights acquired from Corbari, a tenant in common with the other stockholders during the period of dissolution.

Beeler & Campbell Supply Co. vs. Warren

151 Kan. 755

100 Pac. (2d) 700

4. Curative statutes are necessarily retrospective in character and may be enacted by legislature to validate any proceeding which it might have author-

ized in advance or have dispensed with altogether, provided such legislation does not impair vested rights but only confirms rights already existing.

Beeler & Campbell Supply Co. vs. Warren

151 Kan. 755

100 Pac. (2d) 700

16 CJS, Constitutional Law, Sec. 422, page 875.

11 Am. Jur., pages 1208-9

5. The purchase of the pledged stock by defendant Wahyou at foreclosure and sale did not operate to deprive plaintiffs of their interest in the corporate assets acquired by virtue of the assignment from Corbari.

(A) The transferrable character of stock is destroyed by dissolution. Wahyou, at most, acquired only an equitable interest in Corbari's share of the assets of the Diamond-S Ranch Co. Note the fact that the pledge was made during dissolution.

Hollingsworth vs. Ditch Co. (CCA10, 1931)

51 Fed. (2d) 649

In this case the plaintiff had purchased at a sheriff's sale certain certificates of stock in the defendant corporation. Prior to her purchase, the corporation had been dissolved. Plaintiff asked to be adjudged the owner of the shares purchased at the sheriff's sale and prayed further that the trustees of the corporation be ordered to convey to her her proportionate interest in the assets of the corporation. Holding that the plaintiff did not become a stock-

holder of the Ditch Company by virtue of purchasing the shares of stock at the sheriff's sale, the court quoted Morowitz on Private Corporations (2d. ed.), Sec. 168, as stating the applicable rule as follows:

"The right of a stockholder to transfer his shares necessarily ceases upon a dissolution of the corporation; for after a dissolution, the contract of membership is at an end, and no further novation is possible. The interest of the shareholder in the assets of a corporation after its dissolution is a purely equitable claim, and an assignment of this interest will be recognized only by a court having jurisdiction in equity."

16 Fletcher Cyclopedia Corporations, 861, Sec. 8130:

"Dissolution terminates the personal, but not the property, rights of stockholders * * *. The relation of stockholders in an expired corporation are analogous to the relations of partners."

16 Fletcher Cyclopedia Corporations, 872, Sec. 8131:

"The transferrable character of corporate stock is destroyed by dissolution, and an attempted transfer or assignment of shares of stock after the corporation has been dissolved passes no legal title and does not make the purchaser or assignee a stockholder."

(B) When the defendant Wahyou purchased Corbari's stock at the foreclosure sale he did so at a

time when the corporation was dissolved and when he occupied the position of a trustee and was in a fiduciary relationship with the former stockholders, including Corbari and his assignees. In purchasing the stock and purporting to thus extinguish the interest of plaintiffs in and to Corbari's share of the assets of the corporation the defendant Wahyou violated his fiduciary duty to these plaintiffs.

Cal. App, 1952, Directors of a corporation bear a fiduciary relationship to the stockholders and must administer their duties for the common benefit.

Remillard Brick Co. vs. Remillard Dandini Co.
241 Pac. (2d) 66
109 CA(2) 405

Cal. App. 1952. A director of a corporation while acting in a fiduciary capacity would not unite his personal and representative character in the same transaction and use his official position to benefit himself individually.

Bernard vs. Shure
245 Pac. (2d) 370
111 CA(2) 920

Cal. App. 1952. Under the civil code there is a rebuttable presumption of undue influence and insufficient consideration where a trustee deals with his beneficiary. The code includes the relationship of attorney and client.

Civil Code, Sec. 2235

McDonald vs. Hewlett

228 P. (2d) 83

102 CA (2d) 680

Where attorney purchased stock which was affected with a trust in client's favor he has the burden of showing that the purchase was fair and honest and client can secure return without proof of actual fraud.

Martin vs. Dixon

49 Nev. 161

241 Pac. 213

Guardian cannot be permitted to reap any personal benefit from the estate of his ward other than compensation for his services.

Anderson vs. Anderson

54 Nev. 108

7 Pac. (2d) 814

An attorney is disqualified for acting for another interested adversely to his client.

Gottwals vs. Rencher

60 Nev. 35

92 Pac. (2d) 1000

98 Pac. (2d) 481

(Cal. 1898) Under Civil Code, Sec. 2230, Subd. 1, prohibiting trustees and their agents from taking part in any transaction concerning the trust, adversely to the interest of the beneficiary, sale by assignee of an insolvent debtor to his own attorney was void

as to creditors and created a constructive trust in their favor.

Broder vs. Conklin

53 Pac. 699

121 Cal. 282

(Cal. 1926) One in a fiduciary relation may not act in both individual and representative capacity.

In re: Parker's Estate

251 Pac. 907

200 Cal. 132

49 A.L.R. 1025

Under a Missouri statute similar to ours it was held that the trustees of a dissolved corporation are liable to a suit by the stockholders to account, and court of equity had jurisdiction to remove them from office for malfeasance in office, or any betrayal of their trust.

47 A.L.R. 1465

In *Lauger vs. Fargo Mercantile Co.* (1921), 48 N.D. 545, 186 N. W. 104, the directors of an expired corporation who had formed a new one without notifying the plaintiff stockholder were held to be trustees for the stockholders of the dissolved corporation.

It is a broad rule followed in many jurisdictions that any purchase by a trustee for his own benefit of an outstanding title, claim to, or interest in, the trust property, whether at a judicial execution, foreclosure, private or other sale by, or brought about

by, another, is presumed to be for, and inures to the benefit of, the trust estate and the beneficiaries, at their election, irrespective of actual good faith or fraud on the part of the trustee.

54 Am. Jur., Trusts, Sec. 458, page 364

Union P. R. Co. vs. Durant

95 U. S. 576

24 L. Ed. 391

Walden vs. Bodley

14 Pet. (U.S.) 156

10 L. Ed. 398

Willison vs. Watkins

3 Pet. (U.S.) 43

7 L. Ed. 596

Anno:

77 A.L.R. 1515, Sale Brought about by Another

128 A.L.R. 918

To the same effect, see 65 C. J., Trusts, Sec. 521, P. 656, note.

Farmers Loan Co. vs. San Diego Co.

(CCSD Cal. 1891)

45 F. 518,

527 and 528.

North Confidence Mining Co. vs. Fitch

58 Cal. App. 329

208 Pac. 328

Palo Alto Assn. vs. First National Bank

33 Cal. App. 214

164 Pac. 1123

Highland Park Inv. Co. vs. List (1915)

27 Cal. App. 761

151 Pac. 162

Dean vs. Shingle (1926)

198 Cal. 652

246 Pac. 1049

Sims vs. Petaluma Gas & Light Co. (1901)

131 Cal. 656

63 Pac. 1011

Graves vs. Mono Lake Hydraulic Mining Co.
(1889)

81 Cal. 303

22 Pac. 665, 670

(C). The laws of the State of California place a very high duty upon a trustee in his dealings with the corpus of a trust.

“Sec. 2224. One who gains a thing by * * * the violation of a trust is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it.”

“Sec. 2228. Trustee’s obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advan-

tage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

"Sec. 2229. Trustees not to use property for his own profit. A trustee may not use or deal with the trust property for his own profit or for any other purpose unconnected with the trust, in any manner."

"Sec. 2230. Certain transactions forbidden. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

"1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision and without the use of influence on the part of the trustee permits him to do so;"

"Sec. 2231. Trustee's influence not to be used for his advantage. A trustee may not use the influence which his position gives to him to obtain any advantage from his beneficiary."

"Sec. 2232. "Trustee not to assume a trust adverse to interest of beneficiary. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest

of his beneficiary in the subject of the trust, without the consent of the latter.”

“Sec. 2233. To disclose adverse interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interests of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.”

“Sec. 2234. “Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust.”

“Sec. 2235. Presumption against Trustee. All transactions between a trustee and his beneficiary denying the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be interested into by the latter without sufficient consideration, and under undue influence.”

“Sec. 2237. Measure of liability for breach of trust. A trustee who uses or disposes of the trust property contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for the proceeds with interest.”

V

CONCLUSION

While the chronology of events in this case is somewhat complex, the position of plaintiffs and the theory upon which they assert their right to recover the relief prayed is very simple. Plaintiffs believe, first, that the purported renewal or revival of the Diamond-S Ranch Company, as a corporation, did not vitiate the assignment given to plaintiffs by Corbari during dissolution, and second, the sale and purchase on foreclosure of the shares of stock of Corbari by defendant Sam Wahyou does not operate to exclude plaintiffs from participating in Corbari's share of the assets of the Diamond-S Ranch Company for the reason that the defendant, Sam Wahyou, at the time he purchased the stock on foreclosure was a trustee of the assets of the corporation by reason of being a director of the dissolved company and was therefore in a fiduciary relationship with Corbari and with Corbari's assignees, plaintiffs in this case. Whether Wahyou knew of the assignment at the time he purchased the stock or later learned of it, he is now and at all times has been in a fiduciary position as a trustee and along with the other trustees of defendant corporation is liable to account to these plaintiffs for their equitable share of the assets of the company. Moreover, Wahyou purchased the Corbari stock under color of foreclosing a pledge which had been made after dissolution. There is grave doubt if he acquired anything by the transaction.

The pattern of conduct employed by defendants in

this case and carried out under the careful guidance of their mutual attorney, Forrest Macomber, was obviously designed and contrived for the specific purpose of depriving the Smeed Estate of its rightful share in the assets of the company. A somewhat parallel course of conduct came to the attention of Justice Cardoza when he delivered the opinion of the United States Supreme Court in *Buffum vs. Peter Barceloux Co.*, 77 L. Ed. 1140, 289 U. S. 227. There, in April, 1926, Henry Barceloux owned 2500 shares of the Peter Barceloux Co., having a book value of over \$90,000.00 and an actual value of over \$94,000.00, but not traded in and having no current market value. One Freeman had a judgment against Henry Barceloux for \$50,000.00 and wanted his money. On April 27, 1926, Henry Barceloux pledged 2499 shares of his stock to the corporation to secure a pre-existing indebtedness in the amount of about \$33,000.00. In June, 1926, Freeman became insistent for his money or for security and was given an assignment of Henry Barceloux's equity in the shares of stock previously pledged to the corporation. A few days later the corporation cancelled Henry Barceloux's certificates for 2499 shares and took out a new certificate in a new name as pledgee. On August 26, 1926, there was, in the words of Justice Cardoza, "a gesture of a public sale. A printed notice had been posted on a telegraph pole and perhaps elsewhere. There was no other notice to Freeman or to anyone else." The corporation bid the stock in at the sale for the amount of its claim against Henry Barceloux, plus a fee for its attorney.

Henry Barceloux then disposed of all of his remaining property and became bankrupt. The trustee in bankruptcy then brought suit to recover from the Peter Barceloux Co. the value of the property pledged by Henry Barceloux on the theory that the pledge was made with fraudulent intent. Justice Cardoza held the transfer arising out of the pledge, public sale, and purchase by the corporation, to have been a transfer in fraud of creditors, and said:

“The pledge was a step in a general plan which must be viewed as a whole with all its composite implications (citing cases). The principal assets of the debtor were his certificates of stock in the family corporation. There was to be a delivery of these certificates as security for an indebtedness much less than the value of the collateral deposited. There was to be a delivery of other security to make sure that all the assets of the debtor, not otherwise encumbered, would be within the control of the pledgee. There was to be a sale so secret that none of the creditors would be likely to know anything about it, with the result that other bids would be forestalled, and embarrassing inquiries as to preferences averted * * *. The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or afterthought. It was the fruit for which the seed was planted, or so the trier of the facts might look at it.”

See also :

54 Am. Jur., Trusts, Sec. 453

Anno. 1 A.L.R. 747

Anno. 132 A.L.R. 265

In North Confidence Mining, etc. Co. vs. Fitch, et al, 58 Cal. App. 329, 208 Pac. 328, a stockholder brought action to cancel a note and mortgage given by a corporation to defendant Fitch, assignee of defendant Chute. The note and mortgage was to pay a claim, also assigned to Fitch, by Chute, for amounts advanced by Chute as officer of the corporation. The note and mortgage had been authorized by the corporation at a meeting of directors at which five of seven directors were present. Chute himself was one of the five and the attorney for Fitch was another. Four constituted a quorum. Lower court found note to be partly valid. Both plaintiff and defendants appealed. Appellate court reversed, holding note and mortgage was totally invalid, holding that Chute and Webster were both disqualified by the provisions of Section 2230 of the California Code; and that directors of a corporation are trustees within the meaning of that section. Citing, besides cases listed supra:

San Diego vs. Pacific Beach Co.

112 Cal. 53

44 Pac. 333

33 L.R.A. 788

Schnittger vs. Old Home Consol. Mining Co.

144 Cal. 603

78 Pac. 9

Smith vs. Pac. Vinegar & Pickle Works

145 Cal. 352

78 Pac. 550

104 Am. St. Rep. 42

In the case at bar Forrest Macomber was attorney for the corporation, for the defendant Wahyou, and for Corbari. He was also the attorney who took care of the details of the sale of the pledged stock to Wayhou. At the time of the sale to Wahyou he knew of the assignment to Smeed by Corbari, and that the corporation was in dissolution; he knew that the debt to Smeed had not been paid, because he offered at that time to settle the debt for \$5000.00 (99, 100). He also knew that Wahyou was a trustee of the assets of the dissolved corporation and was dealing in a way that could be detrimental to the assignee of a part of the assets of the dissolved corporation. Certainly, if Wahyou had nothing more than constructive notice of the assignment, the knowledge that Macomber had as his attorney and as attorney for the corporation and for Corbari was imputed to Wahyou. It is the position of the plaintiff that the very fact of all of these items being a matter of actual knowledge on the part of the attorney, and all of the details in connection with the foreclosure and sale having been handled by the same attorney, there can be nothing less than an intention on the part of all of

the parties involved to defeat the Smeed interests which had been created by a similar assignment.

Surely no court can say that a holder of an undivided interest in the assets of a dissolved corporation cannot assign or deal with those assets, and once having so dealt is thereby bound. If the assignment was valid at the time it was made and recorded the property interest thereby created in the plaintiffs cannot be erased or voided by the attempted revival of the corporation. The appellants feel that the court should reverse the trial court and grant judgment to the appellants as prayed for in their amended complaint.

Respectfully submitted,

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United States Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
John W. Smeed Estate,

Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH Co., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE, as Trustees for the assets of Dia-
mond-S Ranch Co., THOMAS G. LEE, TOY
QUONG, JOE SIN, K. R. NUTTING, YIP K.
TOON and HERBERT JANG,

Appellees.

Appeal from the United States District Court
for the District of Nevada.

APPELLEES' BRIEF.

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bari, Sam Wahyou, K. R. Nutting
and Thomas G. Lee, trustees for the
assets of Diamond-S Ranch Co.;
Thomas G. Lee; Toy Quong; Joe
Sin; K. R. Nutting; Yip K. Toon;
Herbert Jang, otherwise known as
Herbert Jong.*

FILE

MAR 12 1950

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United States Court of Appeals For the Ninth Circuit

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TOON and HERBERT JANG,

Appellees.

Appeal from the United States District Court
for the District of Nevada.

APPELLEES' BRIEF.

I.

APPELLEES' STATEMENT OF THE CASE.

The facts stated by appellants in their brief are so biased and incomplete that appellees deem it necessary to re-state the facts.

The trial Court in its opinion and decision on motions for summary judgment did an excellent job in stating the nature of the case and the facts and issues involved. Appellees do not feel that they can improve on that statement, and for the convenience of this Court, appellees have printed Judge Ross' opinion as an appendix to this brief. These appellees adopt the facts stated in Judge Ross' opinion.

Appellees would like to add, however, that there was admitted in evidence upon the hearing of the various motions, the balance sheet of Diamond-S Ranch Co. dated December 31, 1951, which was the balance sheet nearest to May 21, 1951, the date of the sale of Corbari's stock at public auction. This balance sheet shows that the liabilities of Diamond-S Ranch Co. on December 31, 1951, exceeded the assets by \$7,122.40. In other words, Corbari's stock as of December 31, 1951, was worth exactly less than nothing, yet Wahyou actually paid \$5,500.00 therefor.

II.

CHRONOLOGY.

There are many dates involved in this case, and appellees here set forth in chronological order the dates of the instruments or the happening of events that are material here, as follows:

Date	Instrument or Event
March 21, 1925, amended 1937	—Enactment of Nevada Corporate Re- vivor Law.
March 12, 1945	—Enactment of Uniform Stock Trans- fer Act.
December 17, 1954	—Diamond-S Ranch Co. incorporated under the laws of Nevada.
November 19, 1947	—Corbari executed a note to C-Arrow Cattle Company, Stockton, and this note was assigned by C-Arrow Cattle Company to Bank of America N. T. & S. A., Hunter Square Branch, Stockton.
January 4, 1949	—Corbari executed a General Pledge Agreement to Bank of America, Hunter Square Branch, Stockton.
March 25, 1950	—W. W. Lord, as Trustee for the John W. Smeed Estate, wrote a letter to Corbari, asking for a second lien on his stock in Diamond-S Ranch; also stating that a lawyer in California refused their second lien and wanted the Trustee to pay off the Bank; also stating that the Trustee could not pay off the Bank. This letter shows conclusively that the Appel- lants knew that Corbari had pledged his stock in Diamond-S Ranch to the Bank on that date.
July 10, 1950	—Corbari executed renewal note in sum of \$6,000.00 to Bank, which was like- wise secured by Corbari's General Pledge Agreement.
September 7, 1950	—Diamond-S Ranch Co. filed its Cer- tificate of Dissolution with the Office of the Secretary of State.
September 18, 1950	—Corbari executed a second Pledge Agreement for the benefit, first, of the Bank of America to secure Cor-

Date	Instrument or Event
	bari's note to it, and, second, to secure D. W. Zignego and Forrest E. Macomber for contingent indebtedness owing by Corbari to them.
October 17, 1950	—Corbari paid Bank of America \$1,000.00, leaving a balance of \$5,000.00 plus interest due to the Bank.
October 17, 1950	—Bank of America, Hunter Square Branch, assigned Corbari's promissory note, together with its security consisting of 310 Shares of the Capital Stock of Diamond-S Ranch Co. owned by Corbari, unto Sam Wahyou, who paid the Bank \$5,000.00 plus interest therefor.
October 31, 1950	—Corbari executed a so-called "Assignment" to Estate of Smeed.
May 21, 1951	—Pledgee's sale of Corbari's stock at public auction to Sam Wahyou.
December 7, 1951	—Diamond-S Ranch Co. filed its Certificate of Revival with the office of the Secretary of State in Nevada, reinstating the Corporation as of September 7, 1950.

III.

ARGUMENT.

Both appellants and appellees made motions for summary judgments and judgments on the pleadings. These motions were heard at the same time and all parties stipulated that they had no further evidence to offer and the cause could be submitted upon these motions. At the hearing of these combined motions, it appeared that the matters in controversy between

appellants and these appellees were actually very simple and could be summarized as follows:

Corbari owed Lord some \$15,000.00 on a promissory note. Lord wanted security from Corbari for the note. Corbari said he had none and Lord said what about your stock in Diamond-S Ranch Co. Corbari replied that his 310 shares of capital stock in Diamond-S Ranch Co. were pledged to the Bank of America in Stockton to secure Corbari's note to that bank and that if Lord wanted to pay off the balance due—some \$5,500.00—he could secure the stock from the bank. Lord stated he was not in a position to pay off the note to the Bank of America and secure Corbari's 310 shares. So, Lord, instead of paying off the Bank of America and obtaining Corbari's stock, elected to and did prepare a document (which obviously, in view of Corbari's pledge of the stock to the bank, had no legal significance) which is set forth in full in Judge Ross' opinion.

Appellee Wahyou purchased the note from the Bank of America and obtained by assignment from that bank Corbari's note, upon which there was \$5,000.00 plus interest due, together with the assignment of Corbari's pledged 310 shares in Diamond-S Ranch Co. Corbari failed to pay the Bank of America or Wahyou, Wahyou duly foreclosed the pledge, obtained title to the stock, and Corbari ceased to be a stockholder in Diamond-S Ranch Co.

While some of these proceedings were going on, Diamond-S Ranch Co. filed a certificate of dissolution in the office of the Secretary of State of Nevada,

later filed a certificate of revival under the laws of Nevada, *reviving and reinstating Diamond-S Ranch Co. as of the date of dissolution*, all as permitted by specific statutes of Nevada, so that for all intents and purposes the corporation never was dissolved. It is only by reason of the dissolution that Lord makes any claim against these appellees. Appellants' theory is that by its dissolution, the corporation ceased to exist from thence forward; it had no right or power to do anything except liquidate its assets and, after payment of its bills, pay the surplus to its former stockholders; that somehow or other the stock, as such, was wiped out and the former stockholders became partners and that Wahyou gained nothing by purchasing Corbari's stock at the foreclosure sale.

IV.

APPELLANTS' SPECIFICATIONS OF ERROR ARE NOT DETERMINATIVE OF THE ISSUES INVOLVED IN THIS CASE.

Before proceeding with the answer to the arguments contained in appellants' brief, we wish to call the Court's attention to the fact that appellants' arguments and citations of authorities have little or nothing to do with this case for the following reasons: Corbari owned 310 shares in Diamond-S Ranch Co. out of a total of 1572½ shares. The Uniform Stock Transfer Act was adopted in Nevada on March 22, 1945 (N.C.L. Sup. 1943-1938 Paragraphs 1854-1854.23). Diamond-S Ranch Co. was incorporated on December 17, 1945, and, of course, issued its stock

thereafter, so that the provisions of the Uniform Act were binding upon all parties.

Corbari owed a large sum of money to the Bank of America in Stockton, and on January 4, 1949, endorsed his certificate of stock for the 310 shares and assigned it to the Bank of America as collateral for the money he owed it; in other words, pledged his stock to secure the debt, executing at that time a collateral pledge agreement. Later, on September 18, 1950, he executed a second pledge agreement to the bank. Wahyou purchased Corbari's note from the Bank of America and secured an assignment of it, together with an assignment of the collateral, to-wit: the stock certificate and pledge agreements. Corbari failed to pay and Wahyou duly foreclosed the pledge, requested the corporation to cancel Corbari's certificate and issue a new certificate for 310 shares to Wahyou. Diamond-S Ranch Co. complied and issued a new certificate to Wahyou on May 21, 1951. Corbari's stock certificate for 310 shares represented his only interest in Diamond-S Ranch Co. The certificate itself was to the fullest extent possible representative of the shares. See Uniform Stock Transfer Act, Uniform Laws Annotated, Vol. 6, Sec. 1, Page 2, Commissioner's Note. Title to the certificate and to the shares represented thereby can be transferred only by delivery of the certificate, duly endorsed or endorsed on a separate document. See Uniform Stock Transfer Act, Uniform Laws Annotated, Vol. 6, Sec. 1, Page 2. That Act provides in Section 1 that title to a certificate and to the shares represented thereby can be transferred only:

“(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent

Commissioners' Note

The provisions of this section are in accordance with the existing law (see Cook on Corporations, section 373 et seq.), except that the transfer of the certificate is here made to operate as a transfer of the shares whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the change is in order that the certificate may, to the fullest extent possible, be the representative of the shares. This is the fundamental purpose of the whole act, and is in accordance with the mercantile usage. The transfer on the books of

the corporation becomes thus like the record of a deed of real estate under a registry system.”

When Corbari endorsed and delivered the certificate to the bank, it was not essential that such transfer be recorded on the corporate books. See:

Pennroad Corp. v. Ladner, 21 Fed. Supp. 575
(Reversed on other grounds) 97 Fed. 2d 10;
12 *Cal. Jur.* 2d Par. 160 to 163, inc. pages 728
and 729;

and

California Corporation Laws, Ballantine &
Sterling, 1949 Edition, par. 233, page 301,

states:

“An unregistered transferee of the certificates will prevail as against a subsequent attaching or execution creditor of the transferor, whether the creditor has notice of the transfer before his levy or not. Such a transfer leaves no interest in the assignor which can be reached by attachment or execution. The true owner has priority over attachment creditors and also over execution purchasers, since unregistered transfers are no longer declared invalid against purchasers on the faith of the records. The creditor obtains only such rights in the shares as his debtor actually had at the time of levy.”

See, also:

California Corporation Laws, Ballantine &
Sterling, 1949 Edition, paragraphs 234 and
235, page 302.

Unregistered transfer good against bona fide purchasers.

Upon the foreclosure of the pledge, Wahyou had a right to a transfer of the shares to his name on the books of the corporation and the corporation would have been guilty of conversion if it refused to do so. See:

Aronson v. Bank of America N. T. & S. A., 9 Cal. 2d 640, 72 Pac. 2d 548.

In

Mastellone v. Argo Oil Corp. (1950), 76 Atl. 2d 118,

the Court held that the holder of a stock certificate which had been properly assigned to him had the right to present it to the corporation for transfer to his name at any time, and where corporation entered into merger agreement with another corporation and no provision was made for transfer of outstanding stock, corporation which issued stock still had power to transfer it and issue new certificates.

The Diamond-S Ranch Co. had filed its certificate of dissolution with the Secretary of State of Nevada on September 7, 1950, and even if the corporation had not been revived, it still had power to issue new certificates to Wahyou. See Section 65, Paragraph 1664, Chapter 177, Statutes of Nevada of 1925 as amended, which states:

“§1664. Expired, Dissolved, Corporations Remain Bodies Corporate Three Years for Certain Purposes.

Sec. 65. All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless for the term of three years from such expiration or dissolution be con-

tinued as bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established.”

Transferring stock is certainly embraced within the term “enabling them gradually to settle and close their business” and, also, is embraced within the term “and to divide their capital stock”.

The Bank of America obtained the title to Corbari’s stock on January 4, 1949, subject only to Corbari’s rights before foreclosure to pay the bank off and obtain the shares back, and there was nothing that Corbari, Diamond-S Ranch Co., or any of Corbari’s creditors could have done to impair the bank’s vested rights to these shares, and Wahyou had all the rights that the bank had after the bank assigned to Wahyou.

The transfer of Corbari’s stock to the Bank of America occurred on January 4, 1949, some twenty (20) months before the certificate of dissolution was filed. *Fletcher Cyclopedia Corporations*, Permanent Edition, Vol. 16, page 880, paragraph 8136, states:

“It is obvious that a transfer or assignment of its property by a corporation, before dissolution, if valid, is not affected by its subsequent dissolution, from whatever cause.”

The dissolution of the corporation after the transfer could not affect the bank’s rights nor its assignee’s rights.

The so-called assignment from Corbari to the Estate of Smeed, executed by Corbari October 31, 1950, had no legal significance whatsoever. It is a meaningless document. There could be no such thing in law.

V.

ANSWER TO APPELLANTS' SPECIFICATIONS OF ERROR.

As to appellants' contention that the attempted revival of the corporation was invalid and without legal effect and the corporation is now and ever since dissolution has been without corporate existence, the law of Nevada specifically provides (Section 93 General Corporation Law of 1925 of Nevada as amended) (1692 NCL 1931-41) that after dissolution proceedings are instituted the corporation may be renewed or *revived*, and that such revival may date back on any date specified by the reviving corporation, which may be prior to the date of the Certificate of Revivor, and that was done in this case so that it is exactly the same as if no certificate of dissolution had ever been filed.

In

Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 16, page 706,

it is stated:

“The corporation, if revived or reinstated pursuant to statute, is the same corporation since another corporation cannot be created by such proceedings. It becomes reinvigorated with all its old powers and franchises, and with its duties

and obligations. Thereafter it may sue and be sued. Reinstatement of the corporation validates previous corporate acts, unless under the terms of the statute the delinquent corporation is, during the period of suspension, wholly without power to act or contract and its attempted acts or contracts are entirely void.”

Once the corporation was revived as of the date of dissolution, as was specifically authorized by the Nevada statute, the corporation was in the same status as if it had never been dissolved.

See:

Russell Box Co. v. Commissioner of Corporation and Tax, 91 N.E. 2d 750 (Mass. 1950), which states, in effect, that where a state statute gives a corporation power to revive, its power to dissolve is subject to the qualification that it could be revived, and it was as though the revival provisions were a part of its charter, and this law was held constitutional.

See, also:

Garzo v. Maid of the Mist Steamboat Co., 104 N.E. 2d 822.

Watts v. Liberty Royalties Corp., 106 Fed. 2d 941 (10th C.C.A.),

which holds that reinstatement after forfeiture restores all powers and validates all acts, including those done while under suspension.

Did the dissolution of Diamond-S Ranch Co. and subsequent reinstatement as of the date of dissolu-

tion have any effect upon appellants' right to create a lien against the assets of Diamond-S Ranch Co.?

We believe the answer is an unqualified "no".

In

Ballantine & Sterling's *California Corporation Laws Manual*, 1949 Edition, page 301, paragraph 233,

Ballantine states:

"¶ 233. Unregistered Transfer Good Against Creditors of the Registered Owner.

An unregistered transferee of the certificates will prevail as against a subsequent attaching or execution creditor of the transferor, whether the creditor has notice of the transfer before his levy or not. Such a transfer leaves no interest in the assignor which can be reached by attachment or execution. The true owner has priority over attachment creditors and also over execution purchasers, since unregistered transfers are no longer declared invalid against purchasers on the faith of the records. The creditor obtains only such rights in the shares as his debtor actually had at the time of levy."

In this case, the Nevada Legislature has specifically provided that any corporation that has elected to dissolve *shall*, nevertheless, for the term of three (3) years from such dissolution be continued as bodies corporate for certain purposes. Section 1692 N.C.L. 1931-41, relating to revivor of corporations, applies to a corporation which has been dissolved. That section provides that any corporation heretofore or now existing under the laws of this state may at any time

procure a renewal or *revivor* of its charter, and that section likewise specifically provides that the certificate of revivor *shall* contain the date when such renewal or revivor of the charter is to commence or be effective, which may be, in cases of a revivor, prior to the date of said certificate. These provisions of the Nevada law can only mean that at least within three (3) years after the certificate of dissolution is filed, the corporation may file a certificate of revival and that revival, if it is to commence or be effective as of the date of dissolution, places the corporation in exactly the same position as if no such certificate of dissolution had ever been filed.

See:

Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co., Inc., Supreme Court, Massachusetts, February 28, 1940, 25 N.E. 2d 719, wherein the Massachusetts Supreme Court states:

“(1) The plaintiff was the owner of the lubricants, and its dissolution by St. 1934, c. 187, subject to the provisions of G.L. (Ter. Ed.) c. 155, §§51, 52, 56, and its revival on January 19, 1937, did not divest it of its title. It continued for three years from March 31, 1934, the date upon which St. 1934, c. 187, became effective, for the purpose of prosecuting and defending suits and for settling and winding up its affairs. G.L. (Ter. Ed.) c. 155 §51. *Schreier v. Kinderhook Knitted Cap. Co.*, 251 App.Div. 16, 295 N.Y.S. 940. Before the statutory period had expired it had been ‘revived for all purposes’ ‘with the same powers, duties and obligations as if it had not been dissolved.’ G.L. (Ter. Ed.) c. 155, §56. *Partan v.*

Niemi, 288 Mass. 111, 192 N.E. 527, 97 A.L.R. 473; Harpoot Assyrian United Association of America v. Assyrian National Union, Inc., 296 Mass. 244, 5 N.E.2d 435.”

In

Dominion Oil Co. v. Lamb, Supreme Court, Colorado, November 2, 1948, 201 Pac. 2d 372, headnotes 1 and 2, which are fully supported by the text, states as follows:

“1. Corporations 1,396

Corporations are creatures of statute and legislature can prescribe the rules by which corporations may be created and rules with which they must comply to continue existence, and can determine what penalties, if any, should be imposed for failure to comply with laws regarding payment of license fees and making of corporation reports.

2. Corporations 615½

When a corporation because of non-payment of taxes becomes by operation of law defunct, and thereafter by payment of the unpaid taxes becomes revived, the revived corporation is regarded as having had continuous existence. '35 C.S.A. Supp. c. 41 §83; c. 142, §103”

The same rule applies to this case. The Nevada Legislature had the power to prescribe the rules by which corporations may be created and with which they must comply to continue existence and how they can become dissolved and revived and what penalties, if any, such corporations must pay in order to revive.

In

Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 16, page 914, paragraph 8156, the author states that the Legislature may by retrospective legislation revive a corporation which has become dissolved.

It is true that some of the older cases followed the common law rule that once a corporation was dissolved or its charter had expired it was dead for all purposes, but this rule has been changed almost completely by statute, and, even in the absence of a statute, the modern cases are to the contrary. When this corporation was formed under the laws of Nevada on December 17, 1945, the revivor statute heretofore mentioned was in full force and effect and the stockholders were, of course, bound by that statute and took their stock knowing that the corporation could elect to dissolve and could thereafter elect to revive, so that any rights any stockholders, or creditors for that matter, had were acquired with this knowledge and none of their vested rights were impaired by the corporation taking such action, as the law of Nevada permitted the corporation to take at the very time it was incorporated. The case of

Rossi v. Caire, 186 Cal. 544,

as well as the subsequent cases cited by appellants, are easily answered by the very language in the *Rossi* case itself. In the *Rossi* case, the Supreme Court says, at page 553:

“We would have an entirely different case had there been a statute authorizing remission of for-

feiture and rehabilitation of the corporation at the time of the forfeiture of its charter. In that event the vesting of the property rights might well have been held to be upon condition."

The case of

Hibernia Securities Co. v. Morey, 23 Cal. App.

2d 482 (1937),

reviews the *Rossi* case, as well as many other cases, and points out that under modern law "during the forfeiture or the time that the corporation is denied the right to exercise corporate functions its existence is merely in a state of suspension, and with the compliance of the requirements of the statute it fully regains its original corporate status with the same powers which it possessed prior to the temporary loss of its corporate franchise, *and that upon restoration to corporate existence, the officers who were in office and the respective stockholders who owned the stock prior to the forfeiture resume each his original status.*" (Emphasis ours.) See, also, the many cases cited in the *Hibernia* case, *supra*, which hold that once reinstated it is as if the corporation had never been suspended or dissolved.

In

Finch v. Finch, 68 Cal. App. 72,

the Court states at page 82:

"(11) Upon restoration to corporate existence each of the officers who was in office and the respective stockholders who owned the stock of the corporation, prior to the forfeiture of the char-

ter of the corporation, resumes each his original status with all the rights appertaining thereto, including, as to the stockholders, the right on dissolution of the corporation to a proportionate division of the assets thereof.”

Appellants at page 22 of their brief, cite:

Hollingsworth v. Ditch Co. (C.C.A. 10, 1931),
51 Fed. 2d 649,

decided in 1931. In that case the plaintiff claimed title to a large number of shares of the common capital stock of Multi Trina Ditch Company, a corporation. The plaintiff alleged in her complaint that the corporate charter of the corporation expired and it became defunct July 1, 1927. She purchased this stock at an execution sale and asked that she be adjudged the owner of the shares and that her appropriate share of the assets (after payment of debts) be paid to her by the liquidating trustees. The Court held that in view of the fact that the corporation charter had expired, the only right she had was that of the registered owner of said shares which she acquired at the execution sale, and that since persons from whom she had acquired the stock could not have maintained this suit in the Court below, the plaintiff and assignee could not; and this by reason of Section 28 U.S.C.A. Paragraph 41.

The Court makes clear that the only point decided in the case is one of jurisdiction and states “This might be construed as a decision on the merits. To avoid that the excerpts will be modified to read thus:

And the Court having heard the arguments of counsel finds that the Court hath no jurisdiction in this case.”

Appellants likewise cited at page 32 of their brief the case of

Buffum v. Peter Barceloux Co., 77 L. Ed. 1140,
289 U.S. 227.

In that case Henry Barceloux in April, 1926, owned one-quarter or 2500 shares of Peter Barceloux Company; the other three-quarters were owned by a brother, sister and three nephews. The book value of Henry's shares was \$90,000 and the actual value \$94,000. Henry had become heavily involved in debt. One Freeman had recovered judgment against him for \$50,000. Henry Barceloux was indebted to the corporation in upwards of \$33,000. In April, 1926, he secured part of this indebtedness by a pledge of 2,499 shares of the company stock. Henry Barceloux also owned shares of stock in other corporations, which he pledged as additional security for the debt he owed to the corporation.

Freeman died and his administrator made a demand upon the secretary of the corporation for a statement of the indebtedness secured by the pledge of stock and also requested that the corporation give him 90 days notice before enforcing its security. These requests were refused and the corporation sold all of the security, and the corporation bought the shares in for the amount of its claim against Henry Barceloux, and immediately sold the stock to George Bar-

celoux taking in payment George's promissory note with a pledge of the shares as collateral security. About two years later, the corporation cancelled the resale, gave back the promissory note to George Barceloux and thereafter held the shares as owner.

In the meantime Henry Barceloux disposed of all of his other assets and became a voluntary bankrupt. The trustee in bankruptcy brought this suit to set aside the transfer of the shares upon the ground that it was done with fraudulent intent. The Court found that the evidence sustained the finding of the District Court that the pledge to the defendant was made in fraud of creditors. The Court found that there was a general conspiracy between the defendant and members of his family to defraud the creditors of the defendant and that the conduct of the corporation and the family members in cancelling an indebtedness of \$33,000 for stock certificates worth triple that amount plus other securities became part of a plan to appropriate a surplus and in combination with its debtor to hold the creditors at bay. The Supreme Court held that since the corporation defendant had sold all of the shares they were accountable for the value thereof and became a general creditor with the other creditors in the bankruptcy proceeding.

This case turned upon a clear unequivocal showing of fraud and conspiracy to defraud and bears no resemblance to the facts in the instant case.

In the case at bar, the trial Court found that "there was no fraud on the part of any of the defendants

named in connection with any of the acts by them performed as complained of in the complaint, including the dissolution and revival of the corporation and the acts and transactions in connection with the acquisition of the Corbari stock by Wahyu", nor was there the slightest evidence produced of any such fraud.

Appellants in their brief cited many cases from various jurisdictions to the effect that upon dissolution of a corporation it is legally dead; it had no rights of any kind and can perform no acts of any kind. This, of course, depends entirely upon the statutes of the state of incorporation and their construction.

See:

Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 16, page 930, paragraph 8166.

For example, in

Rossi v. Caire, 186 Cal. 544,

cited by appellants, it is specifically stated, at page 553, that "we would have an entirely different case had there been a statute authorizing remission of forfeiture and rehabilitation of the corporation at the time of the forfeiture of its charter."

In

National Surety Co. of N. Y. v. Cobb, 66 Fed. 2d 323,

the statute, in that case, did not continue the life of the corporation.

In

Hollingsworth v. Multi Trina Ditch Co., 51
Fed. 2d 649,

the corporation was entirely defunct.

In

In re Booth's Drug Store, Inc., 19 Fed. Supp.
95,

the case states that at common law the corporation was completely dead, but not by modern rule or by most statutes, and it was held that bankruptcy would lie.

In:

Trower v. Stonebraker-Zea Live Stock Co., 17
Fed. Supp. 687,

it was stated that the statute may continue the life of the corporation. And this is true of every case cited by appellants along this line. The statute of Nevada which was enacted prior to the organization of the Diamond-S Ranch Co. expressly provided:

1. For the continuation of the life of the corporation for three years for certain enumerated purposes;
2. Expressly provided for the revival and reinstatement of the corporation, to relate back to the date of dissolution, the obvious intent of which was that the corporation should be treated after reinstatement as if no dissolution had ever occurred. There is a collection of cases along this line in

13 *A.L.R.* 2d 1220

where the editor states:

“That the reinstatement or revival of the corporate powers of a corporation validates its acts during such interim would seem to follow sometimes from the plain language of the applicable statute * * *”

See, also, the principal case annotated at 13 *A.L.R.* 2d 1215,

J. B. Wolfe, Inc. v. Salkind, 70 Atl. 2d 72,

which states:

“9. The reinstatement, upon compliance with applicable statutory provisions, of a corporate charter previously repealed for nonpayment of taxes relates back and validates corporate acts in the interim.”

In

Fletcher Cyclopedia Corporations, Vol. 16, page 706, par. 7998,

it is stated:

“The corporation, if revived or reinstated pursuant to statute, is the same corporation, since another corporation cannot be created by such proceedings. It becomes reinvigorated with all its old powers and franchises, and with its duties and obligations. Thereafter it may sue and be sued. Reinstatement of the corporation validates previous corporate acts, unless under the terms of the statute the delinquent corporation is, during the period of suspension, wholly without power to act or contract and its attempted acts or contracts are entirely void.”

See, also:

13 *Cal. Jur.* 2d page 212, par. 503.

As to appellants' statement that the directors of the corporation were trustees after the corporation filed its certificate of dissolution and were under some sort of fiduciary duty to appellants, it is stated in *Fletcher Cyclopedia Corporations*, Vol. 16, page 947, par. 8175:

“Although the statutes characterize the directors upon dissolution as trustees, they are not trustees of a trust in any true sense of the word. Nor are they officers of the court, but they are merely statutory liquidators.”

VI.

CONCLUSION.

Appellants knew before they prepared the so-called “Assignment” from Corbari that Corbari’s only interest in the Diamond-S Ranch Co. was represented by a stock certificate for 310 shares of its common capital stock; that this stock certificate had been pledged to the Bank of America and there was over \$5,000.00 owing thereon; that under the Uniform Stock Transfer Act they could secure no second lien or lien of any kind from Corbari without actually obtaining possession of this stock certificate and that to get possession of it they would have to pay off the bank. This they specifically stated they were unwilling to do. As the appellants could have foreseen, the debt

to the bank was not paid and the bank's assignee, Wahyou, obtained full title thereto, Corbari's interest therein being completely wiped out. Appellants could have no better interest in these shares than Corbari had, and at this point Corbari had none. Any dissolution or any other act of the corporation could not legally affect Wahyou's rights to this stock.

As to the dissolution of the Diamond-S Ranch Co. and its subsequent revival, the law of Nevada is perfectly plain. It states that after the filing of a certificate of dissolution, any corporation heretofore or now existing under the laws of that state may at any time procure a renewal or revival of its charter by filing a certificate of renewal or revival, and that such certificate should set forth the date when such renewal or revival of the charter was to commence or be effective, which may be, in cases of a revival, prior to the date of said certificate. This is plain language and obviously means that the corporation can be revived as of the date of dissolution, as was done in this case, so that in effect there was no dissolution and all acts done by the corporation during the period between the filing of its certificate of dissolution and revival are validated. In view of the fact that appellants were offered an opportunity to pay off the bank and obtain Corbari's shares of stock and refused to do so, they should have no cause for complaint.

Appellees feel, as evidently did the trial Court, that never at any time did appellants have any meritorious claim against these appellees and that their continuation of this action and this appeal were for purposes

of annoyance and harassment and that the judgment of the trial Court should be sustained.

Dated, March 7, 1956.

Respectfully submitted,

JOHN S. HALLEY,

*Attorneys for A. E. Corbari and Marie
Corbari.*

JOHN DAVIDSON,

FORREST E. MACOMBER,

*Attorneys for Appellees Diamond-S Ranch
Co.; Sam Wahyou; A. E. Corbari,
Sam Wahyou, K. R. Nutting and
Thomas G. Lee, trustees for the assets
of Diamond-S Ranch Co.; Thomas G.
Lee; Toy Quong; Joe Sin; K. R. Nut-
ting; Yip K. Toon; Herbert Jang,
otherwise known as Herbert Jong.*

(Appendix Follows.)

Appendix.

Appendix

*In the United States District Court
for the District of Nevada*

No. 1029

G. A. Miller, W. W. Lord, Ralph Smeed,
L. H. Staus and Jack Smeed, trustees
of John W. Smeed Estate,

Plaintiffs,

vs.

Archie E. Corbari, otherwise known as
A. E. Corbari, Marie Corbari, Sam
Wahyou, Diamond-S Ranch Co., incor-
porated under the laws of Nevada,
et als.,

Defendants.

OPINION AND DECISION ON MOTIONS FOR SUMMARY JUDGMENT.

The above matter being at issue it was set for pre-trial on the 18th day of January, 1955, at which time the Court made and entered its pretrial order. On June 16th, 1955, defendants (except D. W. Zignego and Forrest E. Macomber as to whom the action has been dismissed with prejudice) filed their motion for summary judgment pursuant to Rule 56 and for judg-

ment on the pleadings pursuant to Rule 7(c). The plaintiffs filed their motion for summary judgment under Rule 56(a)(c) on June 14th, 1955. Points and authorities in support of the respective motions were filed, and the motions were argued on the 11th day of July, 1955.

The plaintiffs' motion for summary judgment was supported by the depositions of Archie E. Corbari, Sam Wahyou, Forrest Macomber and W. W. Lord, and also an affidavit by W. W. Lord. In considering the respective motions of plaintiffs and defendants the Court had before it (1) all of the pleadings, (2) the depositions and affidavit above referred to, (3) the Court's pretrial order, (4) defendants' request for admissions and plaintiffs' response thereto, (5) the eighteen exhibits referred to in the schedule of exhibits attached to the pretrial order, and (6) the stipulation of the parties that they had no further evidence to offer.

Nature of Case

By this action the plaintiffs seek to impress a lien against the property of Diamond-S Ranch Co., one of the defendants, and particularly the real property referred to in Exhibit "C" attached to the original and amended complaint, said real property being situate in Humboldt County, Nevada, the record title being in the Diamond-S Ranch Co., a Nevada corporation. Plaintiffs claim the lien in their favor by reason of an assignment by A. E. Corbari and Marie Corbari, his wife, dated October 31st, 1950, whereby

Corbari and his wife assigned to W. W. Lord, as trustee for John W. Smeed, deceased, all their

“right, title and interest in and to all of my partnership interest in the assets of a certain partnership formed by reason of the dissolution of Diamond-S Ranch Co., a Nevada corporation, and in and to any profits arising from the operation of said partnership.”

There was no actual indorsement and/or delivery of the 310 shares of Corbari stock in the Diamond-S Co., at the time the written assignment was made, or at any later time. At the time of the delivery of the assignment to Lord the Corbari stock certificates evidencing his interest in the Diamond-S were in the actual possession of the Bank of America, Hunter Square Branch, Stockton, California, having been delivered to the Bank by Corbari by way of pledge.

Findings of Fact

Since the facts are somewhat involved the Court states them here in chronological order and as findings of fact. Diamond-S Ranch Co. is a Nevada corporation incorporated December 17, 1945, for the purpose of owning and operating ranch property situate in Humboldt County, Nevada. Of the 1572½ shares of stock issued by the corporation Corbari owned 310 shares, the defendants Sam Wahyou, Thomas G. Lee, Toy Quong, Joe Sin, K. R. Nutting, Yip K. Toon and Herbert Jang owning the balance. On January 4th, 1949, Corbari made and executed to Bank of America, Hunter Street Branch, a general assignment

and pledged his 310 shares of Diamond-S stock to the Bank to secure certain indebtedness for which he was wholly or jointly liable.

On September 18th, 1950, Corbari made and executed to the Bank a second pledge agreement securing a promissory note to the Bank dated July 10, 1950, in the amount of \$6,000.00, and also to secure his note to one D. W. Zignego, one of defendants, in the sum of \$12,500.00 on which there was a balance due of \$10,000.00 plus interest, and to secure an indebtedness due one Forrest E. Macomber, another of the defendants named, in the amount of \$12,000.00 plus interest. The pledge agreement of September 18, 1950, was to secure the indebtedness to the Bank, Zignego and Macomber in the order named.

About a week previous to this pledge agreement, on September 7th, 1950, the Diamond-S Ranch Co. filed a Certificate of Corporate Dissolution with the Secretary of State. On October 17th, 1950, Sam Wahyou bought from the Bank the Corbari note, on which there was a balance due of \$5,000.00, and the Bank assigned and delivered to him the Corbari note and the pledged Corbari stock consisting of 310 shares in the Diamond-S Ranch.

On October 31st, 1950, Corbari, who had become indebted to Smeed during his lifetime in connection with the purchase of cattle, executed an assignment to W. W. Lord, testamentary trustee for Smeed. The assignment was to secure the payment of \$15,041.34 plus interest, being the then amount of Corbari's indebtedness to the Smeed estate. The assignment to

Lord, as one of the trustees for the Smeed Estate, contained the following recital:

“Now, therefore, in consideration of the premises, and to secure the payment of said indebtedness, I do hereby sell, assign, transfer and set over unto W. W. Lord, as Trustee, all my right, title and interest in and to all of my partnership interest in the assets of a certain partnership formed by reason of the dissolution of Diamond-S Ranch Co., a Nevada corporation, and in and to any profits arising from the operation of said partnership. I further state that I was the owner of 310 shares of stock in said Diamond-S Ranch Co., and that the total outstanding shares of stock in said company was 1,572½ shares, and that my interest in the partnership and the assets of the partnership formed in connection with the dissolution of said Company, is in the same proportion as was my holding of stock in the total outstanding issue thereof.”

It is to be noted that there was no indorsement or delivery of the Corbari stock certificates to Lord, the certificates having been delivered and pledged to, and retained by, the Bank as above recited.

The Corbari note to the Bank, together with the pledged stock, having been sold, assigned and delivered by the Bank to Wahyou, on October 17th, 1950, Wahyou, through his agent and attorney, Macomber, noticed the pledged stock for pledgee's sale at public auction to be sold on May 21, 1951. Pursuant to said notice of sale the pledged Corbari stock, 310 shares, was sold on the 21st day of May, 1951, and purchased for the account of Wahyou for the sum of \$5,500.00.

On December 7, 1951, the Diamond-S Ranch Co., by and through its then stockholders, Corbari not being named as such as Wahyou then owned his stock, filed a Certificate of Corporate Revival with the Secretary of State reinstating the corporation as of September 7th, 1950, which was the date of its prior dissolution.

The plaintiffs, trustees of the Smeed Estate, assert that at the time of the October 31, 1950, assignment to them by Corbari, or immediately prior thereto and while the matter of the assignment was under discussion, Corbari had represented to them that the Corbari stock was not subject to any outstanding lien or pledge. This is denied by Corbari as indicated by his deposition on file. In any event it would appear that the plaintiffs had notice of a lien against the stock some months prior to the October 31, 1950, assignment. See letter from W. W. Lord, trustee, to Corbari, of date March 25th, 1950, Exhibit 17, reading as follows:

“Dear Arch:

When you were here a few weeks ago, we made an agreement whereby we could get a second lien on the stock of your Nevada Corporation. This agreement was made at your suggestion and it seemed to us, as trustees of the Smeed property, that it was as fair as could be considering our position.

We have now heard from a lawyer in California refusing the second lien and wanting the trustees to pay off the bank in California. We are in no position to do what he suggests and we

are wondering if he misunderstood what we wanted to do or if you have changed your mind.

We are trying to close the estate and this is one of the few items to be determined. Please let us hear from you by return mail what to do.

Sincerely yours,
John W. Smeed Estate
By: W. W. Lord, Trustee."

Comment

On the basis of this factual situation the plaintiffs filed their original complaint in this Court on the 19th day of August, 1952, filing an amended complaint on the 21st day of October, 1954. The amended complaint alleges that on December 31, 1948, Corbari executed his note to Smeed, and that at the time of the filing of the complaint Corbari owed the Smeed Estate \$14,291.34, plus various interest items. That on September 7, 1950, the

"defendant corporation filed with the Secretary of State of State of Nevada the papers necessary to effect a voluntary dissolution of said corporation under Section 1664 (64) of the code of laws of the State of Nevada, (and) the Secretary issued the certificate therein provided for that said corporation was dissolved, and on that day said corporation was dissolved."

That the then board of directors, including Corbari and Wahyou, became trustees of the corporation and of its assets. That the trustees failed to carry out their duties and wind up the affairs of the corporation but continued to actively operate its business.

That on December 7, 1951, a Certificate of Revival or Renewal of Corporate Charter was filed with the Secretary of State. The Certificate recited the dissolution on September 7, 1950, and also that the corporation was

“carrying on the business permitted by Sections 65 and 66, Chapter 177, Statutes of Nevada of 1925, as amended, and desires to renew or continue through revival its existence * * *.”

To this certificate was attached a list of the then stockholders which list indicated that as of October 10, 1951, Corbari was not a stockholder. This, in view of the purchase of the Corbari stock at the sale of the pledged stock on May 21, 1951, was a correct statement.

In Count Three of their amended complaint, plaintiffs set forth the theory on which they seek to impress a lien on the assets of the corporation, namely, that the entire series of transactions whereby Wahyou purchased the Corbari-Bank of America note and received the pledged Corbari stock, were fraudulent and void as to the plaintiffs. That by the terms of Corbari's assignment to the trustees of the Smeed Estate on October 31st, 1950, the trustees had acquired all of Corbari's interest in the assets of the dissolved Diamond-S Ranch Co. It is to be observed that prior to the date of this assignment, October 31, 1950, all of the Corbari stock which the Bank held as a pledge had been by the Bank delivered to Wahyou on the 17th day of October, 1950, and that from that date on Wahyou held the stock as pledge until he acquired

ownership by purchase at the pledge sale on May 21, 1951.

Plaintiffs say that as one of the directors of the Company at the time of dissolution on September 7, 1950, Wahyou became a trustee for the stockholders and creditors of the corporation; that by reason thereof a fiduciary relationship existed between him and Corbari and the creditors, and that while he was acting as trustee for the purpose of winding up the affairs of the dissolved corporation he could not trade in the Corbari stock for his own benefit; that Corbari, Wahyou, and Macomber conspired to defraud the plaintiffs of the benefits accruing to them by virtue of the assignment of October 31, 1950.

Plaintiffs by their amended complaint pray (1) for judgment against A. E. Corbari and his wife for the balance due on their note executed to Smeed, being \$14,291.34 together with several items of interest; (2) that the Court decree the plaintiffs to have a share in the assets of the corporation in proportion to the percentage that the 314 shares of Corbari stock bears to the total issued stock of 1572½ shares; (3) that all the remaining stockholders, officers and statutory trustees of the corporation account for any and all property and profits coming into their hands since the date of dissolution, September 7, 1950; (4) that the Court impress a lien against all of the corporate property for the payment of the balance of principal and interest due on the Corbari-Smeed note; (5) that the assets of the corporation be sold and the plaintiffs paid from the moneys received; (6) and that plain-

tiffs have personal judgment, jointly and severally, against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang, for the sum of \$14,291.34 balance due on the Corbari-Smeed note, plus the various items of interest.

The Issues

The pretrial order, referring to the issues presented by the pleadings states as follows:

“The issues are, as to the first cause of action, whether an additional one thousand dollars should be credited upon the Corbari-Smeed note; as to the remaining counts whether or not the admitted facts are sufficient to create a lien against the assets of Diamond-S Ranch Co., be it presently existing as a corporation, or dissolved and its assets being presently held by its last board of directors as trustees in dissolution.”

First Cause of Action

As to the first cause of action, being against the defendants A. E. Corbari and Marie Corbari, the Court finds that these defendants are indebted to the Smeed Estate in the amounts set forth in Paragraph VI of the amended complaint, namely for the sum of \$14,291.34, plus interest at 5% per annum on the sum of \$15,041.34 from December 31, 1948, to December 31, 1949, plus interest on \$15,041.34 at 8% per annum from December 31, 1949, until November 22, 1950, plus interest on \$14,291.34 at 8% per annum from November 22, 1950, until paid, plus a reasonable attorney fee which the Court fixes at ten (10%) percent of the total amount of principal and interest.

During the pretrial there was some controversy as to whether Corbari had been given credit for an additional \$1,000.00 payment on the note for which he had received no credit. In this connection the pretrial order required the parties to submit further proof on this point.

Pursuant to this requirement the affidavit of W. W. Lord, one of the plaintiffs, was filed herein on the 3rd day of June 1955, and the statements therein made by Lord stand uncontradicted. It is indicated that the confusion as to the \$1,000.00 payment arose by reason of Corbari having given a \$1,000.00 check as a payment on the note which check was dishonored for lack of sufficient funds to pay the same, thus creating a situation where Corbari was entitled to no credit on his note. The Court finds these matters as set out in the Lord affidavit to be true.

It is to be observed that plaintiffs pray for a judgment on the Corbari note against the defendants Wahyou, Macomber, Nutting, Lee, Quong, Sin, Toon and Jang. The first cause of action being an action on the note does not concern the defendants other than Corbari and his wife, and plaintiffs are not entitled to a judgment against any of the other defendants named.

Second Cause of Action

This cause of action has to do with the legal effect of the dissolution and reinstatement of Diamond-S Ranch Co. under Section 1664 (64), N.C.L., 1929. Plaintiffs have no quarrel with the legal procedure

by which the dissolution came about or the reviver was invoked, but assert that after the dissolution the members of the last board of directors became statutory trustees with power only to wind up and terminate the affairs of the dissolved corporation, and that such power went no further than to dispose of the corporate assets, make payment to the creditors, and thereafter make a pro-rata distribution to the stockholders of any remaining money or assets. The plaintiffs assert that instead of winding up the affairs of the dissolved corporation the directors-trustees continued to operate the business of the corporation as a going concern and to all intents and purposes as though it had never been dissolved.

Plaintiffs further urge that the attempted revival of the dissolved corporation was fraudulent for the reason that the "Appointment of Agents", being an affidavit filed with the Secretary of State in connection with the revival proceedings, was false and fraudulent in that whereas it stated that the filing of the certificate for revival was authorized by the unanimous consent of all of the stockholders such was not the fact; that as a matter of law there were no stockholders, in a legal sense, after the date of dissolution, and in any event the affidavit did not list Corbari as the owner of 310 shares of stock.

Plaintiffs further urge that the affidavit failed to disclose the consent of the successors in interest of the Corbari stock to the revival proceedings, at the same time admitting that the Corbari stock was included in the designation of number of shares of stock

owned by Wahyou, his ownership being listed as 631 shares which was 310 shares (amount of Corbari's stock) in addition to his original ownership of 321 shares. Plaintiffs' contention in this respect is based upon their major premise that all of the actions of the directors-trustees after September 7th, 1950, date of dissolution, were fraudulent and void, and that all of the acts whereby Wahyou obtained the Corbari stock were fraudulent and void, and were all a part of a conspiracy to defraud the plaintiffs of the rights acquired by them under the Corbari-Lord assignment of October 31, 1950.

The Court finds that the defendant Wahyou lawfully acquired the Corbari stock, and that all legal requirements were observed in the dissolution and revival of the corporation, and therefore finds against the plaintiffs on Count Two of the complaint.

Third Cause of Action

This count is based on the proposition that the entire series of acts by which Wahyou obtained the Corbari stock were conceived in fraud, and executed in furtherance thereof. The Court is unable to find any evidence of fraud and holds that by virtue of the purchase of the Corbari stock at the sale of pledged property, May 21, 1951, Wahyou became the owner of, and entitled to, all of the benefits represented by the Corbari stock; that such sale and the acquiring of the Corbari stock by Wahyou, then a creditor of Corbari to the extent of some \$12,000.00, was but a normal and rational procedure to be followed by one

in his position; that in connection therewith he breached no fiduciary relation to the plaintiffs, defendants, or any of the other creditors of the corporation; that the acts complained of were not tinged with fraud as against plaintiffs and/or any of the creditors of the corporation; and that any rights that the plaintiffs may have had in or to said stock, or in or to a proportional share in the assets of the corporation, were extinguished by sale of pledged property on May 21, 1951.

In this connection, and before proceeding further, the Court will note the plaintiffs' claim that (1) at the time Corbari made his assignment to Lord, *October 31, 1950*, he represented to the trustees that the stock was clear of liens. This Corbari denied, and it is evident from Lord's letter to Corbari dated March 25, 1950, that Lord knew of a prior assignment and/or pledge of the Corbari's stock several months prior to Corbari's assignment to him. The Court takes the position that this knowledge continued up to and including the date of the execution and delivery of the assignment. In any event it was sufficiently close to that occasion to have put plaintiffs, as reasonably prudent persons, on notice that there was sufficient reason to question the status of the stock, and to merit further inquiry on their part. Had they inquired, the true status of the stock could have been easily ascertained. In any event a false representation by Corbari to Lord made in connection with the assignment would not be binding on Wahyou unless it could be shown that Wahyou also had knowledge of such false rep-

resentation and thereafter by his conduct in connection with the sale of the pledged stock he became party to a conspiracy, as plaintiffs allege, to defraud the plaintiffs.

Based on the deposition on file herein, and particularly the deposition of Corbari and Wahyou, the Court finds that Corbari did not represent to Lord that the stock was "in the clear", but in any event if such a statement was made the Court finds that it was not relied upon by the plaintiffs. They appear to have taken the assignment for what it was worth to add security to a then existing debt evidenced by the unsecured note of date December 31, 1948, in the amount of \$15,041.34, and with knowledge that Corbari was in a "bad way" financially, thus indicating that they felt they should take every precaution to secure the Smeed indebtedness and note, and inquire afterward. That this was the thought of plaintiffs is borne out by the wording of the assignment prepared by plaintiffs' attorney wherein no specific reference is made to the stock, and also by the fact that plaintiffs did not demand, obtain or get, an actual physical delivery of the Corbari stock certificates.

The Court further finds that there is no proof that Wahyou, at the time of the purchase of the stock at the pledge sale had any knowledge of the Corbari assignment to Lord, as trustee for the Smeed Estate, nor of any representations, true or false, made by Corbari to Lord in connection therewith.

The Court further finds that there was no fraud on the part of any of the defendants named in connection

with any of the acts by them performed, as complained of in the complaint, including the dissolution and revival of the corporation, and the acts and transactions in connection with the acquisition of the Corbari stock by Wahyou.

Fourth Cause of Action

What has been heretofore said will dispose of the contentions made by plaintiffs in Count Four of their amended complaint.

Conclusions of Law

As conclusions of law based upon the foregoing finding of facts the Court concludes:

1. That no genuine question of fact exists as to the First Cause of Action and that plaintiffs are entitled to summary judgment against A. E. Corbari and Marie Corbari on said First Cause of Action for the amount of principal and interest due on the Corbari note to Smeed of date December 31, 1948, as alleged in Paragraph VI of plaintiffs' amended complaint, together with an attorney fee in connection therewith in an amount equal to 10% of the total amount of principal and interest.

2. That the defendants are entitled to a summary judgment against the plaintiffs upon said Counts Two, Three and Four of the amended complaint.

It is therefore Ordered that plaintiffs' motion for summary judgment as to the First Count of their amended complaint, be and it is hereby granted, and

that defendants' motion for summary judgment on said Count be denied.

It is further Ordered that the defendants' motion for summary judgment as to the Second, Third and Fourth Count of the Amended Complaint be, and it is hereby granted, and that the plaintiffs' motion for summary judgment on said Counts is hereby denied.

It is further Ordered that the plaintiffs shall have judgment against the defendants Archie E. Corbari and Marie Corbari for their costs, and that the defendants, except Archie E. Corbari and Marie Corbari, shall have judgment against plaintiffs for their costs.

Let judgment be entered accordingly.

Dated at Carson City, Nevada, this 11th day of August, 1955.

John R. Ross,

United States District Judge.

Filed Aug. 11, 1955.

Oliver F. Pratt, Clerk.

By H. N. Jepsen, Deputy.

IN THE
United States
Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
John W. Smeed Estate,

Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE as Trustees for the assets of Diamond-S
Ranch Co., THOMAS G. LEE, TOY QUONG,
JOE SIN, K. R. NUTTING, YIP K. TOON and
HERBERT JANG,

Appellees.

*Appeal from the United States District Court
for the District of Nevada*

APPELLANTS' REPLY BRIEF

SMITH & EWING,

Residing at Caldwell, Idaho,

CARVER, MCCLENAHAN & GREENFIELD,

Residing at Boise, Idaho,

PIKE & McLAUGHLIN,

Residing at Reno, Nevada,

Attorneys for Appellants. **FILE**

MAR 21 1956

PAUL P. O'BRIEN, C

IN THE
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G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
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Residing at Reno, Nevada,

Attorneys for Appellants.

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APPELLANTS' REPLY BRIEF

I

STATEMENT

Because the appellees' brief is framed around theories not supported by fact, law, or logic, this

reply brief is submitted. The fallacy of the arguments made in appellees' brief is apparent in a simple restatement of the points upon which they rest. An analysis of their brief shows reliance on these propositions:

a. That corporate stock continues to have the aspect of property after dissolution of a corporation.

b. That a revival of a corporation as of the date of dissolution can effectively erase intervening rights, acquired from persons equitably entitled to an interest in the assets of the corporation (as distinguished from a stock interest) during the period the corporation was dissolved;

c. That a trustee under a trust created by statute can retain the interest of a beneficiary of the trust acquired for his own account, as against the assignee of such beneficiary, if

1. the trust is subsequently terminated by revival of the corporation; or if

2. The assignee does not choose to pay off the personal indebtedness of the beneficiary to the trustee;

d. That the Uniform Stock Transfer Act applies to the stock of a dissolved corporation, and that certificates in a dissolved corporation must be endorsed and transferred exactly as during corporate existence;

e. That representation of both the beneficiary of a trust and the trustee of a trust by the same at-

torney does not constitute evidence of fraud, as to a creditor-assignee of the beneficiary;

f. That the powers of the corporate entity during the three year winding up period are involved in this case in some manner.

The crucial question is:

CAN SAM WAHYOU, WHILE A TRUSTEE OF THE ASSETS OF THE DISSOLVED CORPORATION, CUT OFF THE RIGHTS OF CORBARI, AND CORBARI'S ASSIGNEE, BY A PURPORTED SALE AND PURCHASE OF STOCK CERTIFICATES, WHICH HE ACQUIRED AFTER THE DISSOLUTION BY PAYING OFF THE BANK TO WHICH THEY HAD BEEN PLEDGED?

Appellants contend that the most Wahyou could acquire would be the equitable right of reimbursement for the amount he paid for the certificates in the expired corporation; more likely, because he is a trustee, he must be held to strictest accountability, and be treated as a volunteer in paying the bank.

II

ARGUMENT

That the transferable character of corporate stock is destroyed by dissolution is universally recognized.

16 Fletcher. Cyc. of Corp. (Perm. Ed.) 870, §8129.

Nothing in the Uniform Stock Transfer Act applies to the stock in a dissolved corporation, the references being entirely to an "organized" corporation.

Uniform Stock Transfer Act, 1945 Nev. S. L., Ch. 188, §22(1). (N.C.L. Sup. 1943-1948, §1854.21, §22(1)).

"After a corporation has been dissolved . . . , the stockholders have not the same power to transfer the legal title to their shares as before the dissolution, for their position is very different. After the dissolution of the corporation, their only right is an equitable right to share in the assets of the corporation after the payments of its debts and after they have paid or been charged with any indebtedness which may have been due from them to the corporation. This equitable right may be assigned, but in such a case the assignee acquires no greater or different rights than the assignor."

12 Fletcher, Cyc. of Corp. (Perm. Ed.) 231, §5461.

Wahyou was a trustee under Section 66 of the Nevada corporation law when he paid off the bank, and acquired the pledged stock. As a trustee, his duties with reference to Corbari were prescribed in the statute. He was to divide the moneys and other property, real and personal, among the stockholders, after making adequate provision for payment of the debts of the dissolved corporation. He

paid off the pledge and purported to acquire the pledged stock while this was the exact measure of his duties—can appellees argue that dealing on his own account, wrongful when done, becomes proper at some later time, as against intervening rights?

Appellants have no concern with whether the Nevada corporate revival statute is unconstitutional generally—it is an unconstitutional application of it, in any event, retroactively to invest with virtue the acts of trustees wrongful when done, to the detriment of creditors of beneficiaries of the trust whose interests intervened.

The duties of the trustee are measured, as stated, by the statute. When the corporation was dissolved the bank holding the pledged stock had no longer a legal interest, but an equitable interest, and that is all the interest that Wahyou could acquire when he paid off the bank. If when he paid off the bank he had been a stranger and not a trustee, he would have been equitably entitled to be reimbursed; he would have had an equitable lien on Corbari's property rights as specified in the dissolution statute—the right to receive a share in the real and personal property after the corporate creditors have been provided for. This lien could have been foreclosed as against the creditors who took a legal assignment of these property rights during the period of dissolution.

But he was not a stranger—he was a trustee for the benefit of Corbari, and other stockholders. He wasn't buying stock, for there was no stock. He couldn't deal on his own account with the trust prop-

erty for such an idea is repugnant in our legal system.

He doesn't, apparently, seriously controvert the trust principles involved. His answer is that the corporation has since revived. It is, he says, as if the corporation had never been dissolved. Whatever may be the situation as to the corporation as a corporation, nothing in the revival statute says that a trustee can avoid his liability for wrongfully dealing with trust property after revival. The trustee's conduct is separately measured. This trustee now holding a doubled interest in the corporation, says that his actions in cutting Corbari out are unassailable because of the revival. The revival has nothing to do with his liability arising out of his wrongful conduct as a trustee. He is liable, in any event.

The appellees' motion for summary judgment should have been denied, and the appellants' motion for summary judgment should have been granted.

Respectfully submitted,

SMITH & EWING,

Caldwell, Idaho,

CARVER, McCLENAHAN & GREENFIELD,

Boise, Idaho,

PIKE & McLAUGHLIN,

Reno, Nevada,

By.....

Laurence N. Smith,

Attorneys for Appellants.

Of Counsel:

Laurence N. Smith,
John A. Carver, Jr.,
Miles N. Pike.

No. 14,902

United States Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
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HERBERT JANG,

Appellees.

Appeal from the United States District Court
for the District of Nevada.

APPELLEES' PETITION FOR REHEARING.

FORREST E. MACOMBER,

711 Bank of America Building, Stockton 2, California,

*Attorney for Appellees and Peti-
tioners Diamond-S Ranch Co.;
Sam Wahyou; A. E. Corbari,
Sam Wahyou, K. R. Nutting and
Thomas G. Lee, trustees for the
assets of Diamond-S Ranch Co.;
Thomas G. Lee; Toy Quong,
Joe Sin; K. R. Nutting; Yip K.
Toon; Herbert Jang, otherwise
known as Herbert Jong.*

FILED

JUL - 3 1956

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*To the Honorable William Denman, Chief Judge, and
to the Honorable Albert Lee Stephens and Walter
L. Pope, Circuit Judges:*

STATEMENT OF REASONS WHY REHEARING SHOULD BE GRANTED.

A rehearing should be granted in this case because
the opinion is in error in the following respects:

1. Although the opinion in no uncertain terms holds that there was no fiduciary relationship between Wahyou and the plaintiffs, it erroneously assumes him to be a trustee.

2. Although the opinion states that there was evidence from which the District Court could have found that Wahyou had proved that the transaction whereby he acquired Corbari's stock was fair it made no such finding, in fact the District Court made very specific findings on that matter.

3. Although the District Court's judgment was made pursuant to joint motions for summary judgment, the entire case had actually been submitted for final decision at the pre-trial conference with both sides declaring they had no further evidence to present.

4. Assuming the burden of proving absence of fraud was upon Wahyou, he met that burden when all the facts surrounding the transaction were presented to the District Court and the District Court made findings of fact which are adequately supported by the evidence.

ARGUMENT.

1. **ALTHOUGH THE OPINION IN NO UNCERTAIN TERMS HOLDS THAT THERE WAS NO FIDUCIARY RELATIONSHIP BETWEEN WAHYOU AND THE PLAINTIFFS, IT ERRONEOUSLY ASSUMES HIM TO BE A TRUSTEE.**

The opinion of this Court, page 5, points out that
“Corbari's interest was not part of the trust over which Wahyou was a trustee. The Nevada Legis-

lature imposed the duties of a trustee upon the directors of a dissolved corporation with regard to their powers to liquidate the corporate assets, pay creditors and distribute the net proceeds to the shareholders. The Nevada statutes make no mention of any powers over a shareholder's interest, and it seems clear the corporate liquidators have no control over how a particular shareholder deals with his interest. The reasons why a trustee may not purchase trust property at a foreclosure sale are not applicable to what was done by Wahyou in this case. The high fiduciary duties of a trustee are imposed on a director of a dissolved corporation to prevent him from personally profiting rather than obtaining the highest prices in the liquidation of assets for all the shareholders. The corporation is in a vulnerable position during dissolution and liquidation. Undoubtedly it would be improper for a director-trustee to purchase the property of the corporation at a foreclosure sale without the consent of the shareholders. As an individual it would be in his interest to enter a low bid while as a trustee it would be in his interest to receive the highest bid possible. Also a director-trustee would be in a position to decide whether the corporation should redeem its pledge or whether it should be allowed to be sold upon foreclosure. On the other hand, a trustee has no duty to buy one beneficiary's interest for the benefit of other beneficiaries: Wahyou was in no position to decide whether Corbari's interest should be redeemed or sold. Whether Wahyou made a low or a high bid for Corbari's interest did not affect the dissolved corporation's financial position. Wahyou, as a result of the purchase, did not occupy a personal position ad-

verse to his duties as a trustee. He was already both a shareholder-beneficiary and a director-trustee.” (Italics ours.)

In a case cited by the Court in its opinion,¹ it was held that “a trust is a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.” As stated by this Court in its opinion, there was no fiduciary relationship between Corbari or his assignee and Wahyou.

Although plaintiffs alleged fraud in connection with the purchase of Corbari’s stock by Wahyou, it did so merely by way of reciting a conclusion of law in its amended complaint² and there was no dispute whatever as to the facts, which were simply that Corbari had long previously owed the Bank of America over \$5,000.00 secured by a pledge of his stock, which plaintiffs well knew, and the bank assigned to Wahyou, who purchased it in at a legally conducted foreclosure sale for the amount owing, with the opportunity open to plaintiffs at all times to purchase the stock themselves.

¹*American Bank and Trust Co. v. Lebanon Bank and Trust Co.*, 28 Tenn. App. 618, 192 S.W. 2d 245 (1945).

²Transcript, page 31, paragraph 2 of the amended complaint.

2. ALTHOUGH THE OPINION STATES THAT THERE WAS EVIDENCE FROM WHICH THE DISTRICT COURT COULD HAVE FOUND THAT WAHYOU HAD PROVED THAT THE TRANSACTION WHEREBY HE ACQUIRED CORBARI'S STOCK WAS FAIR IT MADE NO SUCH FINDING. IN FACT THE DISTRICT COURT MADE VERY SPECIFIC FINDINGS ON THAT MATTER.

The charge of fraud in connection with the foreclosure sale is contained in the third cause of action. The District Court in its opinion and decision on motions for summary judgment made specific findings as to the fairness of the transaction in the following language:³

“Third Cause of Action

This count is based on the proposition that the entire series of acts by which Wahyou obtained the Corbari stock were conceived in fraud, and executed in furtherance thereof. *The Court is unable to find any evidence of fraud* and holds that by virtue of the purchase of the Corbari stock at the sale of pledged property, May 21, 1951, Wahyou became the owner of, and entitled to, all of the benefits represented by the Corbari stock; *that such sale and the acquiring of the Corbari stock by Wahyou, then a creditor of Corbari to the extent of some \$12,000.00, was but the normal and rational procedure to be followed by one in his position; that in connection therewith he breached no fiduciary relation to the plaintiffs, defendants, or any of the other creditors of the corporation; that the acts complained of were not tinged with fraud as against plaintiffs and/or any of the creditors of the corporation; and that any*

³Transcript, page 148, fourth paragraph.

rights that the plaintiffs may have had in or to said stock, or in or to a proportional share in the assets of the corporation were extinguished by sale of pledged property on May 21, 1951.”

* * * * *

“The Court further finds that there is no proof that Wahyou, at the time of the purchase of the stock at the pledge sale had any knowledge of the Corbari assignment to Lord, as trustee for the Smeed Estate, nor of any representation, true or false, made by Corbari to Lord in connection therewith.

The Court further finds that there was no fraud on the part of any of the defendants named in connection with any of the acts by them performed, as complained of in the complaint, including the dissolution and revival of the corporation, and the acts and transactions in connection with the acquisition of the Corbari stock by Wahyou.” (Italics ours.)

-
3. **ALTHOUGH THE DISTRICT COURT’S JUDGMENT WAS MADE PURSUANT TO JOINT MOTIONS FOR SUMMARY JUDGMENT, THE ENTIRE CASE HAD ACTUALLY BEEN SUBMITTED FOR FINAL DECISION AT THE PRE-TRIAL CONFERENCE WITH BOTH SIDES DECLARING THEY HAD NO FURTHER EVIDENCE TO PRESENT.**

There was a pre-trial conference in this case and a pre-trial order made pursuant thereto (Transcript, page 127). In this pre-trial order we find the following (page 129):

“Proof

With the exception of proof bearing upon the additional payment of \$1,000.00 which the Cor-

baris assert they paid on the Smeed note, all of the proof is now before the Court by way of exhibits agreed in evidence at this pretrial, which exhibits are listed in Schedule 'A' attached hereto and made a part hereof by reference."

* * * * *

"Order

Pursuant to discussion and *stipulation of counsel*, and on the basis of the foregoing comment, it is ordered as follows:

1. That the defendants, A. E. Corbari and Marie Corbari, have twenty days within which to submit proof by way of affidavit of the alleged payment of \$1,000.00 on the Smeed note.

2. That all of the exhibits referred to in Schedule 'A' be and they hereby are admitted in evidence.

3. That the parties shall have ten days after submission of proof re the \$1,000.00 additional payment on the Smeed note to make any additional motions, after which *the matter will be deemed submitted for decision on the record.*" (Underscoring and italics ours.)

The evidence as to the \$1,000.00 payment was presented on June 3, 1955 (Transcript, page 146, third paragraph) and the decision of the District Court was made August 11, 1955 (Transcript, page 152). It will thus be seen that at the time the opinion and decision on motions for summary judgment were made, all parties had twice stipulated that they had no further evidence to offer and the matter was submitted to the District Court for decision on the

merits.⁴ In view of the fact that the matter had been completely submitted to the District Court for decision on the merits, appellees suggest that this Court should consider the decision of the Court below a decision on the merits, as the District Court obviously would arrive at the same decision regardless of whether it was made pursuant to submission at the pre-trial conference or by way of motions for summary judgment.

4. **ASSUMING THE BURDEN OF PROVING ABSENCE OF FRAUD WAS UPON WAHYOU, HE MET THAT BURDEN WHEN ALL THE FACTS SURROUNDING THE TRANSACTION WERE PRESENTED TO THE DISTRICT COURT AND THE DISTRICT COURT MADE FINDINGS OF FACT WHICH ARE ADEQUATELY SUPPORTED BY THE EVIDENCE.**

According to Professor Wigmore,⁵ burden or proof means risk of nonpersuasion in its first meaning, which means (par. 2487) that both parties alike must first satisfy the judge that they have a quantity of evidence fit to be considered. This duty, though determined in the first instance by the burden of proof in the sense of the risk of nonpersuasion, is a distinct

⁴In *Meikle v. Timken-Detroit Axle Co.*, 44 Fed. Supp. 460, the headnote, fully supported by the text, states:

"1. Patents

Where both parties to patent infringement action moved for summary judgment, court could treat the motions as pre-trial procedure and dispose of all issues upon which the parties had developed their record by admissions of facts and responses thereto, interrogatories and particulars, and issues not fully developed could be separately tried. Federal Rules of Civil Procedure, rules 12(c), 16, 33, 36, 42, 56, 28 U.S.C.A. following section 723c."

⁵Wigmore on Evidence, Vol. 9, Third Edition, Paragraph 2485.

one, for it is a duty towards the judge and the judge rules against the party if it is not satisfied. *Where a party has satisfied this duty towards the judge and the judge has ruled that sufficient evidence has been introduced, the duty has then ended.*

In a case cited by this Court,⁶ it is stated:

“Of course a disputable presumption may be refuted by evidence of the facts, *but it is normally for the trial court to determine whether the proper testimony outweighs the presumption.*” (Italics ours.)

The District Court in this case had before it details and specific evidence as to all the facts and circumstances in connection with the transaction regarding the sale of the stock and has made specific findings thereon. These findings show that Wahyou made a complete disclosure of the facts and there was not the slightest evidence of any fraud, overreaching or unfairness, and after such findings are made the question of burden of proof is no longer of any importance.

Actually, there was no burden of proof upon Wahyou in this case.⁷ Where, as in this case, there is no confidential relationship and the plaintiff alleges

⁶*McDonald v. Hewlett*, 102 Cal. App. 2d 680 at 688, 22 Pac. 2d 83.

⁷13 Am. Jur. page 962, Par. 1010:

“In other words, ordinarily, a corporate officer or director has a right to purchase the stock of a shareholder therein the same as any other person has a right to purchase such stock, and there is nothing in the mere fact that the purchaser is an officer or director of the corporation, the shares of which he purchases, from which fraud or unfair dealing may be inferred.”

fraud, such fraud is not presumed but the burden of proving the same, either actual or constructive, is upon the person asserting the existence thereof.⁸ There was actually no contest as to the facts relating to the purchase of the stock by Wahyou. Where there is no contest as to the facts, findings need not be made, and where the case is submitted on an agreed statement of facts or case stated, findings need not be made.⁹

If the evidence in this case were conflicting and unsatisfactory, the Court could properly reverse and remand with instructions to make essential findings and to hear additional evidence that might be offered, but such reversal and remand is not proper where no issue of fact is presented nor where the record does not contain contradictory evidence.

The Court has noted the case of *Bisbee v. Midland Linseed Products Co.*, 19 Fed. 2d 24, wherein it is held that no trust duty rests upon the directors, officers, majority stockholders or liquidators of a corporation in behalf of any other stockholders with respect to dealings between them in buying or selling stock in the corporation unless some situation exists which makes it inequitable for such officer to buy the stock in question. The facts of the instant case are even further removed from that case in that here

⁸89 C.J.S. page 1075, Par. 155:

"Fraud, out of which a trust ex malificio arises, is not presumed, and the burden of proving the existence of the fraud, actual or constructive, necessary to give rise to a constructive trust is on the person asserting the existence of such a trust."

⁹*Saltonstall v. Russell*, 152 U.S. 628, 38 L. Ed. 576, 14 Supreme Court 733;
53 Am. Jur. 788.

Wahyou purchased Corbari's interest at a pledge sale rather than directly from Corbari. Since no trust duty exists, there is no reason for placing a burden of proof on Wahyou to prove fairness or lack of misuse of any fiduciary position. At any rate, the burden of proof should not be a problem where the parties stipulate to factual matters and submit the case pursuant thereto.

Rule 52 does not require court to make findings on all facts presented or to make detailed evidentiary findings, but where findings are sufficient to support ultimate conclusion of court, they are sufficient, and it is not necessary for the court to make findings asserting negative of each issue raised, but it is sufficient if special affirmative facts found by court, construed as a whole, negative each rejected contention.¹⁰ Under Rule 52 as amended, if an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. This amendment permits findings of fact and conclusions of law to appear in the trial court's opinion or memorandum.¹¹

¹⁰*Carr v. Yokohama Specie Bank, Limited, of San Francisco*, C.A. 9th, 1953, 200 F. 2d 251.

¹¹*Walker v. Lightfoot*, C.C.A. 9th, 1941, 124 F. 2d 3;
Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 2, page 826, Par. 1128.

CONCLUSION.

It is respectfully submitted that further consideration should be given to the points urged and a rehearing should be granted so as not to unduly prolong this litigation and subject appellees to a bill for costs on appeal where, as in this case, the matter was twice submitted to the District Court with a stipulation that there was no further evidence to be produced—once at the pre-trial conference and again upon motions for summary judgment—and upon the oral argument before this Court both counsel reiterated that neither of them had any further evidence to produce.

We respectfully urge that the Court grant a rehearing and reconsider this matter.

Dated, Stockton, California,

July 2, 1956.

Respectfully submitted,

FORREST E. MACOMBER,

Attorney for Appellees and Petitioners Diamond-S Ranch Co.; Sam Wahyou; A. E. Corbari, Sam Wahyou, K. R. Nutting and Thomas G. Lee, trustees for the assets of Diamond-S Ranch Co.; Thomas G. Lee; Toy Quong; Joe Sin; K. R. Nutting; Yip K. Toon; Herbert Jang, otherwise known as Herbert Jong.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the within petition for rehearing is well founded and that it is not interposed for delay.

Dated, Stockton, California,
July 2, 1956.

FORREST E. MACOMBER,
*Attorney for said Appellees
and Petitioners.*

No. 14903

United States
Court of Appeals
for the Ninth Circuit

THE BANK OF ARIZONA, a Corporation,
Appellant,

vs.

NATIONAL SURETY CORPORATION, a Corpora-
tion,
Appellee.

BRIEF FOR APPELLANT

FAVOUR AND QUAIL
JOHN M. FAVOUR
Prescott, Arizona
Attorneys for Appellant

Appeal from the United States District Court for the
District of Arizona

FILE

FEB 1 1956

PAUL R. DYEREN

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United States
Court of Appeals
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THE BANK OF ARIZONA, a Corporation,
Appellant,

vs.

NATIONAL SURETY CORPORATION, a Corpora-
tion,
Appellee.

BRIEF FOR APPELLANT

OPINION BELOW

The Findings of Fact and Conclusions of Law of the District Court appear at pages 47-55 of the Transcript of Record.¹

1. References to the printed record are designated as "R"

JURISDICTION

The jurisdiction of the District Court was invoked under Act June 25, 1948, c. 646; 62 Stat. 930; 28 U. S. C. A. 1332. Appellee, National Surety Corporation, a New York corporation brought suit against Appellant and others in the United States District Court for the District of Arizona, alleging: Appellant was an Arizona banking corporation; defendant Food Machinery and Chemical Corporation was a Delaware corporation; defendants B. Harlan Fike and Marvin F. Gordon were citizens of the State of Arizona; defendants Babbitt Brothers Trading Company and Flagstaff Lumber Company were Arizona corporations, and that the amount in controversy exceeded the sum of \$3,000, exclusive of interest and costs. (R 3, 4).

The Findings of Fact of the District Court confirmed these jurisdictional allegations (R 48-49). The final judgment of the District Court was entered on July 15, 1955 (R 56-59); the Appellant's Notice of Appeal to this Court of Appeals from a portion of the final Judgment was filed August 4, 1955. The jurisdiction of this Court is invoked under Act June 25, 1948, c. 646; 62 Stat. 929; 28 U.S.C.A. 1291.

QUESTIONS PRESENTED

Whether a Surety can create for itself, under a theory of subrogation, rights which its purported subrogor did not have.

Whether a compensated Surety has in its own right, without benefit of assignment or subrogation, an equitable lien on the proceeds of a government contract which

will permit it, upon payment of the penalty under its payment bond, to recover the loss from any person who has received any of the contract proceeds with knowledge that the laborers and material men were not paid in full at the time the moneys having their source in the contract were paid to him.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set out in the Appendix, *infra*.

STATEMENT

On June 18, 1952, the Dollar Construction Company (hereinafter referred to as "Contractor") entered into a Contract with the Government (hereinafter referred to as "Contract") whereby it agreed to perform certain work at the Navajo Ordnance Depot, Bellemont, Arizona (hereinafter referred to as the "Navajo Job"), in consideration for which the Government agreed to pay Contractor the sum of \$12,180.00, (later increased by a Change Order to \$12,580.00), in a lump sum on the completion of the job. (R 49)

The Contract required the Contractor to furnish to the Government a Performance Bond and a Payment Bond. (R 49).

The Contract contained no express provision for the payment by Contractor to persons who furnished labor and materials and contained no provision for retained percentages. (R 49)

In conformity with the requirements of Act August 24, 1935, c. 642, section 1; 49 Stat. 793 (40 U.S.C.A. 270)

(hereinafter referred to as the “Miller Act”) and the provisions of the Contract, Contractor furnished and Government accepted and approved a Performance Bond and a Payment Bond, in the penal sum of \$6,-090.00 each, executed in Arizona on June 18, 1952, by Contractor and Appellee (hereinafter referred to as “Surety”). (R 49, 50).

The Payment Bond¹ was conditioned that Contractor should promptly make payment to all persons supplying labor and materials in the prosecution of the work provided in the Contract. (R 50).

The Performance Bond² was conditioned that Contractor should perform the Contract.

As a condition precedent to and as part of the consideration for the execution of the Performance Bond and the Payment Bond, Contractor executed and delivered to Surety an “Application for Contract Bond” (R 50, 127-130).

Surety is not a bank, trust company or other financing institution. Surety gave no notice of the above referred to Bond Application to any person or agency as required by the Assignment of Claims Act 1940, as amended, 31 U.S. C. A.203 ; 41 U. S. C. A. 15, Appendix, *Infra*, and its contents were not known to Bank until the commencement of this action. (R-50)

The Food Machinery and Chemical Corporation and B. Harlan Fike (hereinafter referred to as “Material-

1. U.S. Standard form 25A, see Section 54.16 Appendix, Title 41, U.S.C.A. p. 256.

2. U.S. Standard form 25, see Section 54.15 Appendix, Title 41, U.S.C.A. p. 249.

men'') each supplied labor and materials to Contractor on the Navajo Job, in the respective sums of \$8,644.40 and \$3,579.60 (R 50). The Navajo Job was completed by Contractor on October 20, 1952 (R 51) and was certified by the Government as meeting the plans and specifications of the Contract (R 191, 192). At the time of completion the above mentioned sums were due and owing to the Materialmen, no portion thereof having been paid. (R 51).

On October 22, 1952, the Contractor procured a loan from Appellant (hereinafter referred to as "Bank") in the principal sum of \$10,000.00, in consideration for which Contractor executed an Assignment to Bank of the proceeds of the Contract. (R 51)

The entire loan proceeds were deposited to the credit of Contractor's then and theretofore existing general checking account with the Bank. (R 51)

At the time the loan was made by Bank, the Bank ascertained from the contracting officer at the Navajo Ordnance Depot that the Contract had been completed and that the proceeds of the Contract were shortly forthcoming. (R 51, 107, 108)

At the time the loan was made the Contractor had had an account with the Bank for a month or two. (R 150). The Bank knew Contractor had several jobs going (R 150) and that it was having the common difficulty of many Contractors of getting its money in from jobs to continue its operations. (R 141). This difficulty arose not from a matter of insolvency but from a shortage of the Contractor's operating cash. (R 142, 149, 155). At

the time the loan was made Bank was told by Contractor the money was needed to pay up the laborers and materialmen on the Navajo Job. Bank did not know, nor did it ascertain how much of the loan would be needed for that purpose (R 136-137, 142)

The Bank ascertained prior to making the Loan that the Contractor had furnished a Payment Bond, although the Bank had no actual knowledge of the identity of the surety on the bond. (R 51, 52).

The contracting officer at the Navajo Ordnance Depot approved and accepted the Assignment to Bank on October 22, 1952. (R 185, 187)

On or about December 9, 1952, the Bank delivered a formal written notice of the assignment to the Government contracting officer at the Navajo Ordnance Depot (R 111, 112, 184, 185), mailed a notice of the assignment together with a true copy of the instrument of assignment to the Surety (R 188, 189), which notice was received by the Surety on December 10, 1952 (R 52). Surety's notice was forwarded in the same form as the notice to the contracting officer (R 184, 185). Surety, however, returned its notice to the Bank with a form of acceptance which it prepared (R 96, 189) with a letter of transmittal explaining the revision. (R 187). The receipt of this form of acceptance subsequent to December 23, 1952, was the first knowledge Bank had of contractor's default.

Bank also filed with the United States Army Finance Officer at Los Angeles, the disbursing officer designated in the Contract to make payment, a copy of the as-

signment, together with the notice of assignment. (R 118, 119, 190, 191). These instruments were received by the Finance Officer on December 11, 1952 (R 119). The Government check in the sum of \$12,580.00, the proceeds of the Contract, was issued December 12, 1952, and received by Bank on December 15, 1952. (R 53, 121)

On receipt of the check the Bank applied \$10,139.51 of the Contract proceeds in satisfaction of the Contractor's loan obligation to the Bank. At the time the proceeds were applied, the Bank knew that the Contractor had not paid all Materialmen. Upon demand of surety a Cashier's check payable to Contractor for the remaining balance of the Contract proceeds, \$2,440.49, was mailed to Surety and was thereupon endorsed specially by Contractor to Fike. (R 53)

On April 23, 1953, Surety commenced an action in the District Court by filing a complaint later amended on July 15, 1954, against Bank and the five materialmen who had made claims against Surety on its Payment Bond. The original aggregate of these claims was \$12,438.12. The claim of Fike was reduced by the application of the balance of the Contract proceeds by \$2,440.49, leaving the aggregate of unpaid materialmen claims totaling \$9,997.63. (R 7)

Concurrently with the filing of the complaint Surety deposited with the Clerk of the District Court the sum of \$6,090.00 representing the full penalty of the above mentioned Payment Bond. (R 53) This sum was alleged as not being sufficient in amount to pay all per-

sons who supplied labor and material in the prosecution of the work provided for in the contract, but it was alleged that sum theretofore applied by the Bank to the payment of its note was more than sufficient to discharge the unpaid obligations (R 10)

The Bank was alleged in Surety's complaint as owing the materialmen the sum of \$9,997.63 for money had and received from the United States of America. (R 11)

The complaint of the Surety set up a purported assignment to Surety contained in the Contract Bond Application of Contractor (R 5, 6) and alleged the Bank knew or should have known of the purported prior assignment of the contract proceeds to Surety at the time Bank took this Assignment. (R 7, 8) Surety further alleged Bank knew or should have know that Surety was entitled to exoneration from its obligations to pay for labor and material and was entitled to subrogation and to a prior right in and claim to the contract funds. (R 8)

The relief sought by the Surety was: (1) that the materialmen be required to interplead and litigate their rights against Surety and Bank (R 11); (2) that the Court adjudge and direct the return to the plaintiff of the \$6,090 deposit with the Clerk of the District Court (R 11); (3) that the Court adjudge and decree that the Bank pay into Court the sum of \$10,139.50 received by it and that the Court adjudge and direct that upon the receipt of the same the Clerk pay the materialmen and disburse the remainder to the Bank (R 11, 12), (4) the alternative relief prayed was that in the event the sum of \$6,090 be not returned to the Surety, the Surety have and recover from the Bank that sum. (R 12)

The answer of the Bank, by the second defense, placed in issue the purported Assignment of the contract proceeds to Surety (R 13) and the amounts due to the materialmen. (R 14)

Bank admitted its loan to the Contractor and the Assignment to Bank and alleged such Assignment as being received in good faith, without notice, and permitted and perfected under the Assignment of Claims Act, 1940, as amended. (R 14, 15)

Bank denied the notice of and the existence of any rights of Surety by subrogation or exoneration. (R 16)

The defendant Food Machinery filed a cross-claim against defendant Fike asserting a right to share in the \$2440.49 of the contract proceeds paid to Fike; Food Machinery cross-claimed against Bank seeking satisfaction in full of its claim of \$8644.40, and further counter-claimed against Surety for the same relief. Defendant Fike also filed a counter-claim against Surety seeking recovery of the balance of its claim of \$1139.11. The Court rendered judgment that the Bank and Fike have judgment on the cross-claim of Food Machinery; that Fike and Food Machinery have judgment on their counter-claims against Surety in the respective sums of \$708.88 and \$5,381.12, and that the Surety have judgment against the Bank of Arizona in the sum of \$6090. (R 56-59)

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making that portion of Finding of Fact No. 5 (R 50) which legally construed the Contractor's Bond application (R 127-130) as having the effect of an assignment

“ . . . to indemnify Surety for any liability Surety might incur by reason of having executed . . . the Payment Bond.”

because such Finding was an erroneous conclusion of law, for the reason that the application (R 127-130) has the legal effect of an assignment to indemnify Surety only for any liability Surety might incur by reason of having executed the Performance Bond.

2. In making that portion of Finding of Fact No. 11 (R 52)

“ At the time the loan was made by Bank and the assignment to it was executed, Bank, in the exercise of reasonable care and diligence, should have known: . . .

(c) the proceeds of the Contract then in the hands of the Government were inchoately subject to an equity in favor of Surety in that if Surety was required to pay the materialmen who the Contractor failed to pay, then Surety would become subrogated to the right of the Government to have the Contract proceeds applied in payment of the Materialmen, and that right would relate back to the date of the Payment Bond.”

for the reason that the Finding is an erroneous conclusion of law in that it places a legal duty upon the Bank to have known that which neither existed by reason of fact or law.

3. In making that portion of its first Conclusion of Law (R 53-54) that

“The failure of Contractor on and prior to October 20, 1952, or at all, to make payment to persons supplying labor and materials in the prosecution of the work provided in the Contract rendered the Contractor in default under the provisions of the Contract . . . ;”

because the conclusion that a default occurred under the provisions of the Contract is not sustained by the Findings of Fact and is contrary to the fact found, (Finding No. 3, R 49) that

“The Contract contained no express provision for the payment by Contractor to persons who furnished labor and materials and contained no provision for retained percentages.”

4. In making that portion of its first Conclusion of Law (R 54) that

“. . . by the payment into Court by Surety of \$6,-090.00 which was the full amount of its penalty under the Payment Bond, Surety became subrogated to the right of the Government to have the Contract proceeds applied in payment of the Materialmen, said right of subrogation relates back to the date of the Payment Bond, June 18, 1952”

for the reason that the payment of the Contract proceeds by Government to Bank terminated any rights of

the Government to the proceeds or the application thereof, which rights could not be revived to enforce restitution, refund or repayment to the United States of the money paid to Bank, an assignee under an assignment perfected under the Assignment of Claims Act of 1940 as amended.

5. In making its second Conclusion of Law (R 54) that the

“Contractor held its right to the proceeds of the Contract, subject to an equitable lien in favor of Surety; when it transferred its right to Bank, Bank took the proceeds of the Contract subject to Surety’s equitable lien”.

for the following reasons:

a. The facts do not justify a conclusion that an “equitable lien” arose by subrogation of Surety either to the rights of the Government or to the rights of the Materialmen because the Materialmen had no rights in fact or law to which the Surety could be subrogated to as determined by the Court in its Conclusion of Law No. VII, (R 55) that

“The Materialmen have no equitable, legal or moral right against Bank or to the Contract proceeds which were paid by Government to Bank.”

and because the Government’s rights were terminated upon payment

b. The facts do not justify a conclusion that an “equitable lien” arose from the Contractor’s application to Surety (R 127-130) because the instrument effected an assignment by Contractor to Surety of only

such moneys that might be due and payable at the time of any breach or default in the Contract for the purpose of indemnifying Surety for any liability Surety might incur by reason of having executed the Performance Bond and in fact no breach or default in the Contract ever occurred and Surety incurred no liability under the Performance Bond.

c. The Bank purchased its assignment of the Contract proceeds for value, in good faith, without notice of the contents or existence of the Application for Contract bond, perfected its Assignment under the Assignment of Claims Act of 1940, as amended, and received payment thereunder.

d. Surety has no "equitable lien" to the Contract proceeds without reliance upon a theory of subrogation or assignment.

6. In making its 6th Conclusion of Law (R 55) that

"Surety is entitled to judgment against Bank for the sum of \$6,090.00"

for the reason that the Conclusions of Law supporting this ultimate conclusion are erroneous and not supported by the facts as found.

7. In entering that portion of the Judgment appealed (R 59)

"4. That plaintiff National Surety Corporation have judgment on its amended complaint against the defendant, The Bank of Arizona, in the sum of \$6,090.00"

for the reason that the facts do not justify such judgment and it is contrary to law.

SUMMARY OF ARGUMENT

Surety acquired no rights against Bank by subrogation to the rights of either the Materialmen or the Government. The Materialmen never had any rights against the Bank to which the Surety could become subrogated. *California Bank v. United States Fidelity & Guaranty Co.*, 129 F. 2d 751. Though the government may recognize a moral obligation to see that the unpaid reserves of the Contract price held by the government as a stakeholder are applied to the claims of unpaid materialmen and may assert a right to see that they are so applied, nevertheless, upon the payment of the fund all rights and duties of the government in the fund cease. *California Bank v. United States Fidelity & Guaranty Co.*, 129 F. 2d 751, *Kane v. First National Bank*, 56 F. 2d 534, 85 A.L.R. 362, *Royal Indemnity Co. v. United States*, 93 F. Supp. 891. The moneys due under the Contract which were assigned to Bank pursuant to the Assignment of Claims Act, having been received by the Bank under the assignment, were free of any right on the part of the government, Act. May 15, 1951, c. 75; 65 Stat. 41, amending the Assignment of Claims Act of 1940, 31 U.S.C.A. 203, 41 U.S.C.A. 15. One can not acquire by subrogation what another whose rights he claims did not have. *U.S. v. Munsey Trust Co.* 332 U.S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022. The extinguishment of the right of the subrogor extinguishes the same right for the subrogee. *National Surety v. Pixton*, 60 Utah 289, 208 Pac. 24 A.L.R. 1487.

Surety acquired no rights to the Contract proceeds by assignment. The assignment to Surety contained in

the bond application was to indemnify Surety only for any liability Surety might incur by reason of having executed the Performance Bond and the moneys assigned for this indemnification were such as might be due at the time of a default in the Contract. Therefore, since Contractor did not default on its Performance Bond, the assignment did not become effective as to any of the Contract proceeds.

Surety has no equitable lien on the Contract proceeds in its own rights. If the government contract proceeds are subject to a continuing equitable lien in favor of Surety which follows the proceeds even after payment, the rule must rest upon the theory that the compensated Surety has this equitable lien in its own right and not dependent upon subrogation or assignment. The authorities implying a lien or the imposition of a trust upon the Contract proceeds rely upon facts giving rise to rights of Surety by subrogation, where the unexpended funds are in the hands of the government. *Henningesen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404, 28 S. Ct. 389, 32 L. Ed. 547; *Royal Indemnity Co. v. United States*, 93 F. Supp. 891; *Hadden v. United States*, 132 F. Supp. 202; *National Surety Co. v. United States*, 133 F. Supp. 381. or depend upon a known assignment to Surety of the Contract proceeds where the funds are paid out. *Martin v. National Surety Co.* 300 U.S. 588, 57 S. Ct. 531, 81 L. Ed. 822, *Pacific Indemnity Co. v. Grand Avenue State Bank of Dallas*, 233 F. 2d 513. The former class of cases where the fund is held by the government, are inapplicable; the latter class of cases, imposing a trust or lien upon the Contract funds

after payment, have no application where assignee of the Contractor purchases his assignment for value, in good faith, without notice of a prior assignment, and obtains payment. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 65 S. Ct. 405, 89 L. Ed. 305; *California Bank v. United States Fidelity & Guaranty Co.*, 129 F. 2d 751; *Kane v. First National Bank*, 56 F. 2d 534, 85 A. L. R. 362; *Fidelity & Deposit Co. v. Union State Bank*, 21 F. 2d 102; *Restatement of Contracts*, Section 173-b and 174.

ARGUMENT

POINT ONE

SURETY ACQUIRED NO RIGHTS AGAINST BANK BY SUBROGATION TO THE RIGHTS OF EITHER THE MATERIALMEN OR THE GOVERNMENT

The Materialmen never had any rights against the Bank to which the Surety could become subrogated.

*California Bank v. United States
Fidelity & Guaranty Co. (C.C.A. 9th,
1942)
129 F. 2d 751, 753.*

The District Court properly entered its seventh Conclusion of Law (R 55) that:

“The materialmen have no equitable, legal or moral right against Bank or to the contract proceeds which were paid by Government to Bank.”

and properly gave judgment to Bank on the cross-claim of materialman Food Chemical, that the cross-com-

plainant take nothing from defendant Bank. by its claim. (R 59)

Though the government may recognize a moral obligation to see that the unpaid reserves of the contract price held by the government as a stakeholder are applied to the claims of unpaid materialmen and may assert a right to see that they are so applied, nevertheless, upon the payment of the fund all rights and duties of the government in the fund cease.

California Bank v. United States
Fidelity & Guaranty Co.
129 F. 2d 751

Kane v. First National Bank
(C.C.A. 5th, 1932)
56 F. 2d 534
85 A. L. R. 362

Royal Indemnity Co. v. United States
93 F. Supp. 891

Subsequent to the performance of the Contract, i.e., at a time when no default of Contractor under its government contract could occur, the Contractor assigned the Contract proceeds to Bank. Bank is of the class of permitted assignees under the Assignment of Claims Act of 1940, as amended, 31 U.S.C.A. 203, 41 U.S.C.A. 15, Appendix, *infra*. Prior to the payment by Government of the Contract proceeds, Bank complied with the requirement of the Assignment of Claims Act by filing written notice of the assignment, together with a true copy of the instrument of assignment with the contracting officer, the Surety and the disbursing officer.

It is not necessary to determine on the facts of this case whether the Bank's assignment, permitted and perfected under the Assignment of Claim Act of 1940, would have given it a preferred right over the right of the government to apply the funds to the payment of materialmen, had the funds been held in the hands of the government, because the funds were in fact paid to Bank. The conflict of the decisions of the United States Court of Claims in

Royal Indemnity Co. v. United States
93 F. Supp. 891

Hadden v. United States
132 F. Supp. 202

National Surety Corporation
v. United States
133 F. Supp. 381

on this point and the decisions of the Court of Appeals, Fifth Circuit, in

Cocoanut Grove Exchange Bank v.
New Amsterdam Casualty Co.
149 F. 2d 73

General Casualty Co. v. Second
National Bank of Houston
178 F. 2d 679.

arise upon the factual situation of those cases where the funds are yet held by the government as a stakeholder.

In the instant case, payment was made by the issuance of a Government check in the sum of \$12,580, the full Contract price, on December 12, 1952 (R 121), which check was received by the Bank on December 15,

1952, and used to the extent necessary to satisfy the Contractor's debt to Bank. (R 53)

These moneys due under the Contract which had been assigned pursuant to the Assignment of Claims Act having been received by the Bank under the Assignment, were free of any right on the part of the government by the express provisions of Act May 15, 1951, c. 75, 65. Stat. 41, amending the Assignment of Claims Act of 1940, 31 U.S.C.A. 203, 41 U.S.C.A. 15:

“In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.”

Since neither the Materialmen nor the Government had any rights against the Bank or to the fund paid to it, Surety could acquire no rights by subrogation to the position of the Materialmen or the Government.

“It is elementary that one can not acquire by subrogation what another whose rights he claims did not have . . . One who rests on subrogation stands in the place of one whose claims he has paid as if the payment giving rise to the subrogation had not been made.”

U. S. v. Munsey Trust Co.
332 US. 234, 242
67 S. Ct. 1599
91 L. Ed. 2022, 2029

Surety could not revive, by later payment, a right which its subrogor could not revive. The extinguishment of the right of the subrogor extinguishes the same right for the subrogee. In the case of

National Surety v. Pixton
60 Utah 289
208 Pac. 878
24 ALR 1487, 1494

the Court held that by the enactment of a statute which gave up the preferential right the State might have to bank deposits, upon the deposit by the State of its funds, the surety on the bank's deposit bond, in the event of default and payment by surety, was effectively foreclosed from being subrogated to the preferential right the State might otherwise have had.

POINT TWO

SURETY ACQUIRED NO RIGHTS TO THE CONTRACT PROCEEDS BY ASSIGNMENT.

The Miller Act, Act Aug. 24, 1935, c. 642, sec. 1; 49 Stat. 793; 40 U.S.C.A. 270a requires two separate bonds on a government contract job, a performance bond for the protection of the government and a payment bond for the protection of the materialmen.

Prior to the enactment of the Miller Act, 40 U.S.C.A. 270¹ had provided for only one bond to secure both the payment and performance. The distinction between the purpose and the effect of the two bonds is well defined.

Where, as here, the contract makes no express provision for the payment of laborers and materialmen, (R 49), a public contractor's bond for the performance of the contract does not inure to the benefit of laborers and materialmen and consequently there is no loss to surety under the performance bond for unpaid claims of persons who supply labor and materials. The authorities are collected in 77 A.L.R. 105 and 118 A.L.R. 75. Since the contract was completed and the work certified as having met plans and specifications of the contract (R 51, 191-192) no liability of Surety ever arose under its Performance Bond and no breach or default in the Contract ever occurred.

Surety claimed a purported assignment of the Contract proceeds in its amended Complaint (R 5-6) as resting upon the Contractor's covenants and agree-

1. Based on Aug. 13, 1894 c. 280, 28 Stat. 278; Feb. 24, 1905, c. 778, 33 Stat. 811; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167.

ments as set forth in paragraphs 4th and 7th of an application which was allegedly required and received by Surety as a condition precedent and as a part of the consideration for Surety executing a Performance Bond and a Payment Bond. The application is reproduced on pages 127-130 of the printed record.

The application is a printed form of the Surety Company which has been artfully and tediously drawn in detail, with the obvious purpose of giving legal efficacy to its language. The form as completed is the application of the Contractor of June 20, 1952, that Surety executed a bond in the sum of \$12,180 in favor of the United States, the principal object of such bond being to

“guarantee the performance of a certain contract” as thereafter described. In the blanks following, the Contract is identified as the Navajo Job Contract, payment to be made on completion with no reserve.

A reading of the entire application shows that the form contemplated the issuance by the Surety of a bond to guarantee to the Treasurer of the United States the performance of the Contract and the protection of Surety for its obligations under such a Performance Bond. No reference is made to the issuance of a Payment Bond or to the protection of Surety in its obligations under a Payment Bond.

The language of “said bond” or the “bond hereinabove applied for” appears throughout the application as very clearly applying to one bond only. The application was not meant to cover and affect the relation of the parties in respect to other than a single Perform-

ance Bond, otherwise the application would have meticulously specified the singular and plural of the word "bond" in the method used in specifying the singular, plural and gender of other words.¹

The entire indemnity provisions of paragraph fourth (R 5-6, 129) are to indemnify Surety for executing the bond to "guarantee the performance of the Contract".

Under paragraph sixth of the application (R 129) the only conditions upon which Surety may assert its right of foreclosure of its security, in the paragraph specified for indemnity, are the "default on the part of the undersigned in the performance of the Contract hereinabove referred to", and the non-payment of premiums.

Paragraph seventh (R 129) purports to provide additional security for the indemnification of Surety. Consistently with the entire instrument, "the deferred payments and retained percentages and any and all moneys and properties that may be due and payable" to the Contractor which are assigned to Surety for its indemnification, are those which are due and payable to the Contractor "*at the time of any breach or default in said Contract, or that thereafter may become due and payable*" to the Contractor.

1. The consideration clause: (R 129): "The undersigned and each of them for himself (itself), his (its) . . .". Paragraph 4: (R 129) ". . . or any unpaid bond premium(s) . . . in enforcing any covenant(s) of this agreement . . ." Paragraph 11: (R 129) ". . . at the address(es) . . ." Paragraph 19: (R 130) ". . . any provision(s) of any law(s) concerning the disclosure(s) . . ." Paragraph 20 (R 130) ". . . that he (they) is (are) entitled . . ."

The District Court properly refused to make Finding 10(j) proposed by Surety (R 25) that at the time the loan was made by Bank and the assignment to it was executed, Bank knew, or in the exercise of reasonable care and diligence should have known: “. . . (j) Contractor had previously assigned the proceeds of the Government Contract to Surety.” The District Court further properly refused to enter the first and second conclusions of law proposed by Surety (R 26) “I. At the time Contractor assigned the proceeds of the Contract to Bank there existed a valid prior assignment of the Contract proceeds by Contractor to Surety. II. The rights of Surety under the prior assignment are superior to the rights of Bank which procured the execution of the subsequent assignment and received the proceeds of the Contract with notice of the prior assignment and rights of Surety.”.

The question of priority of an assignment to Bank and an assignment to Surety does not arise, since Surety in fact and in law had no assignment of the Contract proceeds.

The Contractor's application to Surety is digested with pertinent parts in a parallel comparison with the application of the Contractor to the United States Fidelity and Guaranty Co. in *California Bank v. United States Fidelity & Guaranty Co.* 129 F. 2d 751. This comparison is for the purpose of illustrating the difference between a form prepared to indemnity surety for both bonds as in the *California Bank Case* and the form of application now before this Court.

POINT THREE

SURETY HAS NO EQUITABLE LIEN ON THE CONTRACT PROCEEDS IN ITS OWN RIGHTS.

If the Conclusion of the District Court is correct that the government contract proceeds are subject to a continuing equitable lien in favor of Surety which follows the proceeds even after payment, it must rest upon the theory that the compensated Surety has this equitable lien in its own right and not dependent upon subrogation or assignment.

If such a lien exists, it must then be founded upon the particular facts of this case. The fact that the recipient of the funds is a bank should not control, and the case must be considered in the light of the rights of any creditor receiving the government contract proceeds with knowledge of their source. Knowing the source of the money, the creditor is bound to know that the Miller Act has required the Contractor to execute a Performance Bond, which bond must, according to law, provide for the protection of laborers and materialmen; the creditor is bound to know that if the laborers and materialmen are not paid the Surety must pay them; therefore the creditor must ascertain at his peril whether or not there are any outstanding obligations of the Contractor to the laborers and materialmen before accepting payment, else he assumes the obligations of the compensated Surety to the extent of the payment received.

There is, however, no authority for the existence of an equity of Surety in the Contract proceeds paid to Bank upon the facts in this case. The authorities using language implying a lien or the imposition of a trust upon the Contract proceeds rely upon facts giving rise to rights of Surety by subrogation, where the unexpended funds are in the hands of the government

Henningsen v. United States
Fidelity & Guaranty Co.
208 U.S. 404
28 S. Ct. 389
52 L. Ed. 547

Royal Indemnity Co.
v. United States
93 F. Supp. 891

Hadden v. United States
(U.S. Ct. of Claims, 1955)
132 F. Supp. 202

National Surety Co. v. United States
(U.S. Ct. of Claims, 1955)
133 F. Supp. 381

or depend upon a known assignment to Surety of the Contract proceeds where the funds are paid out.

Martin v. National Surety Co.
300 U. S. 588
57 S. Ct. 531
81 L. Ed. 822

Pacific Indemnity Co. v. Grand Avenue
State Bank of Dallas
C.C.A. 5th, 1955
(233 F. 2d 513)

The former class of cases resting upon subrogation,

where the fund is held by the government, is inapplicable; the latter class of cases imposing a trust upon the Contract funds after payment by the government must be examined upon the facts of each case.

In

Martin v. National Surety Co.
300 U.S. 588
57 S. Ct. 531
81 L. Ed. 822

the holding of the Court that the funds paid to a creditor were impressed with a trust in favor of the materialmen was based upon the narrow ground chosen by the Court, page 593, 300 U.S. that:

“The proceeds of the contract when collected by Martin (the creditor) under his power of attorney were received by him with knowledge of the agreement between the contractor and the surety whereby such proceeds became a fund to be devoted in the first instance to the payment of materialmen and others similarly situated.”

The “agreement” known to the creditor was the contents of the bond application which the creditor, as agent for the surety, had himself personally accepted. The creditor further had actual knowledge of a power of attorney solicited by the surety from the contractor to protect itself after the difficulties of the contractor became known to surety and creditor. The entire determination of the equities impressed on the fund arose from the knowledge of the specific agreement which was determined by the Court to have created an equitable

lien when the subject matter of the assignment was reduced to the possession and was in the hands of the contractor or persons claiming under him, with notice.

The Supreme Court of the United States later distinguished the facts of the Martin case from the situation where a subsequent assignee takes without notice of the prior assignment to surety. The Court said, in

McKenzie v. Irving Trust Co.
323 U.S. 365, 372-3
65 S. Ct. 405
89 L. Ed. 305, 310-311

“In any event the affidavits fail to establish the asserted priority of the surety over respondent (bank). The surety did not perfect its assignment¹ by giving the notices and procuring the consent required by the statute (Assignment of Claims Act of 1940). It did not receive the proceeds of the contract here in question. They were paid to respondent which does not appear to have had any notice of the prior assignment to the surety. Under the Federal rule respondent is entitled to retain the assigned moneys which it received without notice of the prior assignment to surety. (Citations). The Martin case does not control here since the subsequent assignee in that case took with notice of an early assignment and as part of an obviously fraudulent scheme. These facts which were sufficient in that case to require that the subsequent assignee relinquish the transferred funds are lacking here.”

1. The assignment to the bank in McKenzie v. Irving Trust Co., was perfected under the Assignment of Claims Act of 1940, 323 US 368.

The recent decision of the Court of Appeals, 5th Circuit, in

Pacific Indemnity Co. v. Grand
Avenue State Bank of Dallas
223 F. 2d, 513

was determined upon a theory that the funds received by the bank in payment of the contractor's debt were impressed with a trust for surety's benefit. The trust arose by virtue of the specific agreement between contractor and surety contained in contractor's application and the declared default of contractor whereupon surety had taken over the contract. Prior to the bank's charging the contractor's account in satisfaction of the contractor's debt to it, the surety commenced an action in the state court against contractor wherein a temporary restraining order was issued restraining the contractor from disposing of funds in the contractor's possession as proceeds of the construction contract. Though the bank was not a party to this action, a copy of the restraining order was served upon it and from this service it had, as in the Martin case, actual knowledge of the trust claimed by surety by virtue of its agreement with contractor and the declared default of contractor. With knowledge of these facts, the bank inquired of the contractor of its condition and upon being advised that it was insolvent, the bank then charged contractor's account. The issue in the case was whether the bank's lack of notice at the time it received the government check for deposit should control over the bank's actual knowledge of the trust at the time of payment.

Other cases in which the contract proceeds were paid

out fail to impose a constructive lien or to impress a trust where the recipient of the money has no notice of the agreement between surety and contractor.

In

Kane v. First National Bank
C.C.A. 5th 1932
56 F. 2d 534, 535-536
85 A.L.R. 362, 365

the bank received on deposit, for contractor, moneys which the bank knew were in partial payment from a public contract. Upon the contractor advising the bank of its inability to continue in business, bank charged the account in payment of the contractor's debts to the bank. The Court, in ruling that the bonding surety on the public job had no claim to the contract proceeds paid to the bank, said:

“In the absence of statute or stipulation otherwise. the general responsibility of the contractor is credited in contracting with him and his general resources are drawn on by him in executing the contract. Money or checks paid to him as the work progresses are the property of the contractor unencumbered by any trust, just as are the payments to others for goods manufactured or services performed. The contractor's banker may receive such checks and is not bound to see to their application, nor to ascertain the state of the contractor's account with each contract; nor if he knows it need he govern himself in any wise with reference thereto.”

See also:

Fidelity & Deposit Co. v. Union
State Bank
21 F. 2d. 102

In the case at bar, at the time the loan was made and the assignment accepted, Bank had no knowledge of the purported assignment by Contractor to Surety. (R 50). It will be noted that the essential fact indicating to Bank any default of Contractor was that all of the Materialmen had not been paid. Bank did not know the nature or extent of the unpaid bills and made no effort to find out. Surety, however, would place a duty upon Bank to ascertain the indebtedness of Contractor on the job and determine from what it discovers whether or not Contractor is in default under the Payment Bond. If Surety is successful in imposing this duty upon creditors of Contractor, it will effect upon the Contract proceeds a continuing lien relieving sureties of their payment bond obligations, because their rights will no longer be limited to the reserves in the hands of the government; by invoking the doctrine of relation, their rights of subrogation may always be revived. Contractors are constantly indebted to laborers and materialmen through the entire progress of a job and usually for periods of varying lengths following the completion of a job. If the contractor's indebtedness is a caveat to all persons who take his money in exchange for fair consideration, the practices of commerce and the principles of commercial law will have to undergo considerable revision. The holding of

California Bank v. United States
Fidelity & Guaranty Co.
129 F. 2d 751

will be overruled by this Court.

In the "California Bank Case" the contractor received payment from the government contract in the sum of \$28,815.04 on June 30, 1933, and bank accepted payment of contractor's debt to it on the same day, knowing the source of the money. At the time he received the \$28,815.04, the contractor owed that amount, and more, to persons supplying labor and material in the prosecution of the work. The bank received payment, however, without knowing of the assignment to surety of the contract proceeds; bank first learned of the assignment on July 19, 1938, nineteen days after it had received payment. The existing indebtedness of contractor at the time of payment was not notice of default by the holding of this Court.

The facts of the case at bar are parallel, with the exception that here the bank did not learn of the purported assignment to Surety until the commencement of this action (R 50) in April, 1953, and did not learn of the default of Contractor until subsequent to December 23, 1952, more than eight days after payment to Bank (R 187-189, 53). It is submitted that the rule applied in the California Bank case, at page 755 of 129 F. 2d is applicable to the facts of this case, that:

"The doctrine of relation cannot be used by a subrogee for the purpose of recovering money paid to a creditor without notice in satisfaction of a just

debt, prior to the maturing of any right of subrogation.”

It is further submitted that the dictum of the California Bank case preceding the above quoted passage relative to the exclusion of an assignee of the contractor from the rule is not applicable where the assignee purchases his assignment for value in good faith without notice of a prior assignment and obtains payment or satisfaction of the obligor's duty.

Restatement of Contracts
Sections 173-b and 174

Collins v. O'Connell
(C.C.A., 1943)
136 F. 2d 141, 143 (re Arizona
Authority of Restatement)

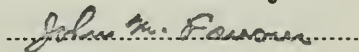
McKenzie v. Irving Trust Co.
323 U.S. 365
65 S. Ct. 405
89 L. Ed. 305

CONCLUSION

For the reasons stated the portion of the judgment appealed should be reversed and the amended complaint of Appellee dismissed as to Appellant, with costs to Appellant.

Respectfully submitted,

FAVOUR AND QUAIL



John M. Favour

Prescott, Arizona

Attorneys for Appellant

February 1956

APPENDIX A

PUBLIC CONTRACTS
ASSIGNMENT STATUTES

I

ASSIGNMENT STATUTES IN FORCE PRIOR TO OCTOBER 9, 1940, THE DATE OF ENACTMENT OF THE ASSIGNMENT OF CLAIMS ACT OF 1940.

R.S. Section 3477.

“All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part, or share thereof (with inapplicable exceptions), shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof . . .”

R. S. Section 3737

“No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for

any breach of such contract by the contracting parties, are reserved to the United States.”

II

ASSIGNMENT STATUTES EFFECTIVE SUBSEQUENT TO OCTOBER 9, 1940 AND PRIOR TO MAY 15, 1951.

R. S. Sections 3477 and 3737 were amended by the addition of the following language by the Assignment of Claims Act of 1940, Act of October 9, 1940, c. 779, Section 1; 54 Stat. 1029 (31 U.S.C.A. 203; 41 U.S.C.A. 15) :

“The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company or other financing institution, including any Federal lending agency: *Provided* 1. That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; 2. That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; 3. That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made

to one party as agent or trustee for two or more parties participating in such financing; 4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with—(a) the General Accounting Office, (b) the contracting officer or the head of his department or agency, (c) the surety or sureties upon the bond or bonds, if any, in connection with such contract, and (d) the disbursing officer, if any, designated in such contract to make payment. Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this paragraph and the following paragraph shall constitute a valid assignment for all purposes.

Any contract entered into by the War Department or the Navy Department may provide that payments to an assignee of any claim arising under such contract shall not be subject to reduction or set-off, and if it is so provided in such contract, such payments shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of such contract.”

III

ASSIGNMENT STATUTES EFFECTIVE SINCE MAY 15, 1951.

R. S. Sections 3477 and 3737 as amended by Assignment of Claims Act of 1940 were further amended by

Act May 15, 1951, c. 75; 65 Stat. 41; (31 U.S.C.A. 203; 41 U.S.C.A. 15) to strike out all after clause 3 of the proviso and inserting in lieu thereof the following:

“4. That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section, shall constitute a valid assignment for all purposes.

In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment . . .”

APPENDIX B

COMPARISON OF THE APPLICATION OF CONTRACTOR IN BANK OF ARIZONA V. NATIONAL SURETY CORPORATION AND CALIFORNIA BANK V. UNITED STATES F. & G. CO., 129 F 2d 751, 752.

Application in B. of A. v. National Surety (R 127-130):

“(Contractor) hereby covenants . . . to indemnify the . . . (Surety) . . . against any and all liability, losses, costs, damages . . . and expenses . . . whatever . . . which (Surety) may sustain or incur by reason . . . of having executed or procured the execution of the bond¹ hereinabove applied for . . . and which (Surety) may . . . incur . . . in making any investigation . . . in obtaining . . . release from liability . . . such Bond.¹ (Paragraph 4th of Application - R129)

Application in California Bank v. U.S.F. & G. Co.

“(Anderson) hereby agrees . . . to indemnify the Company (appellee) against all loss, damages, claims, suits, costs and expenses whatever . . . which the Company may sustain or incur by reason of executing or procuring said bond,¹ or making any investigation on account of same . . . or settling any claim . . . in connection with same . . . and does hereby assign and convey to the Company as collateral to secure the obligations herein and any other indebtedness or liabilities

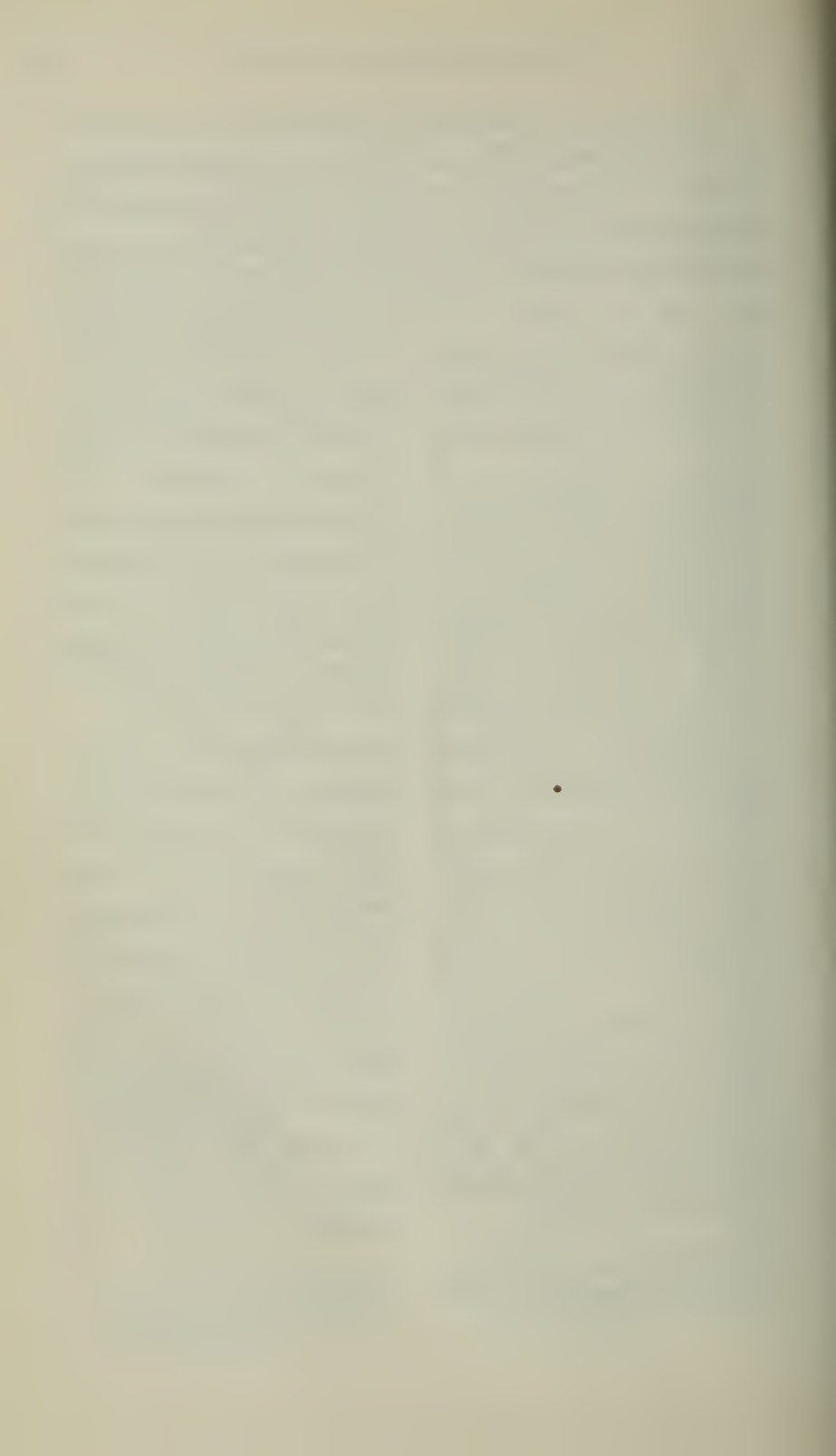
1. Such bond being to “guarantee the performance of (the Contract)” (R 127).

1. The bonds referred to in the applications were two performance bonds and two payment bonds. See note No. 3 129 F 2d at 752

(Contractor) hereby assigns, transfers and conveys to the (Surety) all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the (Contractor) at the time of any breach or default in said contract or that thereafter may become due and payable to the (Contractor) on account of said contract; or on account of extra work or materials supplied in connection therewith hereby agreeing that such money, and the proceeds of such payments and properties shall be the sole property of the (Surety) and to be by it credited upon any loss, cost, damage, charge and expense sustained or incurred by it in connection with said Bond.¹ (Paragraph 7th of Application R-129)

of (Anderson) to the Company, whether heretofore or hereafter incurred, all the right, title and interest of (Anderson) in and to (a) said contract, and any change, addition, substitution or new contract (including all retained percentages, deferred payments, earned moneys and all moneys and properties that may be due or become due under said contract, change addition, substitution or new contract) . . . such assignment to be effective as of the date of the construction contract, but only in event of (1) any breach of any of the agreements herein contained or of said contract or performance bond or of any other bond executed or procured by the Company on behalf of (Anderson) . . .”

1. Such bond being to “guarantee the performance of (the Contract)” (R 127)



No. 14903

United States Court of Appeals
for the Ninth Circuit

THE BANK OF ARIZONA, a Corporation,
Appellant,

vs.

NATIONAL SURETY CORPORATION, a
Corporation,
Appellee.

BRIEF OF APPELLEE

MOORE & ROMLEY
Phoenix, Arizona
Attorneys for Appellee

Appeal from the United States District Court for the
District of Arizona

FILED

MAR - 7 1956

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No. 14903

United States Court of Appeals

for the Ninth Circuit

THE BANK OF ARIZONA, a Corporation,
Appellant,

vs.

NATIONAL SURETY CORPORATION, a
Corporation,
Appellee.

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

For convenience and brevity we will refer to the parties as follows: Appellee National Surety Corporation as "Surety"; Appellant The Bank of Arizona as "Bank" and Dollar Construction Company as "Contractor". Contract No. DA-02-002-AVI-104, executed by the Government and the Contractor, will be referred to as "the Contract"; and the work provided for therein will be referred to as the "Navajo job". Persons who supplied labor and materials in the prosecution of the work provided for in the Contract will be referred to as "the Materialmen". The Transcript of Record will be referred to as "Tr."

SUMMARY OF ARGUMENT

The Government had not only a right but an equitable obligation to see that the Materialmen were paid. When Bank, pur-

suant to an assignment by Contractor, received the Contract proceeds on December 15, 1952, it had constructive notice that they were part of a fund in which Surety had, or might thereafter acquire, a superior right. Surety became subrogated to the right of the Government, and its right of subrogation related back to the date of the payment bond, June 18, 1952.

As a condition precedent to and as part of the consideration for the execution of the payment bond by Surety, Contractor assigned to Surety all moneys that might be due and payable at the time of any breach or default in the Contract. This assignment was valid as to a subsequent assignee of the Contractor. The Contract, as well as the Miller Act, expressly required Contractor to furnish a payment bond conditioned that Contractor should promptly make payment to the Materialmen. Both at the time Contractor assigned the Contract proceeds to Bank and at the time Bank received those proceeds from the Government, Contractor had failed promptly, or at all, to make payment to the Materialmen and was therefore in default. Surety's right to the proceeds of the Contract by virtue of its assignment existed prior to Bank's assignment and long prior to receipt by Bank of those proceeds. Bank admits that at the time it received the Contract proceeds it knew, or in the exercise of reasonable care and diligence should have known, that Contractor was in default. Bank received the Contract proceeds with constructive notice of Surety's assignment, and Surety may therefore recover those proceeds from Bank.

The loan was made by Bank to Contractor for the avowed purpose, in part at least, of enabling Contractor to pay the Materialmen. At the time of the loan, Bank knew that Contractor was having financial difficulty and could not pay the Materialmen except out of the proceeds of the Contract or the loan. Bank did not inquire as to how much was due the Materialmen or whether the loan proceeds were actually used to pay them. In fact, none of the loan proceeds were so used, but were diverted by the Contractor to some other purpose.

Bank knew Contractor had furnished a payment bond and should have known that the payment bond was conditioned that Contractor should promptly make payment to the Materialmen. At the time it received the Contract proceeds Bank knew or should have known Contractor was in default. Bank, therefore, now holds the Contract proceeds in constructive trust for the benefit of Surety.

For any one, or all, of the foregoing reasons the judgment of the trial court should be affirmed.

ARGUMENT

I

Surety's Rights to Contract Proceeds by Subrogation Are Superior to Rights of Bank

The payment bond executed by Surety was conditioned that Contractor should promptly make payment to all persons supplying labor and materials in the prosecution of the work provided in the Contract. (Tr. 50) The Navajo job was completed on October 20, 1952. (Tr. 51) At that time Contractor had failed promptly, or at all, to make payment to the Materialmen. (Tr. 51)

Surety Subrogated to Government's Right The Government had not only a right but an equitable obligation to see that the Materialmen were paid; Surety became subrogated to that right. *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404, 28 S.Ct. 389, 52 L.Ed. 547; *California Bank v. United States Fidelity & Guar. Co.* (C.C.A. 9), 129 Fed.(2d) 751.

Bank argues that when it received the Contract proceeds the Government no longer had any right to which Surety could be subrogated. In support of this argument Bank relies on *National Surety Co. v. Pixton* (Utah), 208 Pac. 878, 24 A.L.R. 1487. In this case the court held that where a state statute compels the treasurer, upon deposit of state funds in a bank, to secure the re-

payment of those funds, the state waives its preferential right over other depositors, precluding the surety on the bond for repayment from acquiring that right of subrogation. It should be noted that the state's preferential right was held to be waived *before* the surety had executed the bond.

Right of Subrogation Relates Back

Here, Surety's right of subrogation relates back to the date of the payment bond, June 18, 1952, as to an assignee of Contractor who received the Contract proceeds with notice that they were part of a fund in which Surety had or might thereafter acquire a superior right. *Henningsen v. United States Fidelity & Guaranty Co.*, supra, 208 U.S. 404, 28 S.Ct. 389, 52 L.Ed. 547; *California Bank v. United States Fidelity & Guar. Co.* (C.C.A. 9), supra, 129 Fed.(2d) 751.

On October 20, 1952, Contractor borrowed \$10,000.00 from Bank and executed an assignment to it of the proceeds of the Contract. (Tr. 51) At that time Bank knew the Navajo job had been completed and the proceeds of the Contract were shortly forthcoming. It knew that Contractor had not paid all the Materialmen. It knew that Contractor had been required to and had furnished a payment bond and should have known the payment bond was conditioned that Contractor should promptly make payment to the Materialmen. (Tr. 51, 52) It knew that Surety was obligated to pay the Materialmen if Contractor failed to do so. (Tr. 52)

Bank's vice-president who negotiated the loan to Contractor had no previous experience with assignments of the proceeds of Government contracts. (Tr. 72-73; 104-105; 157) He knew that Guaranty Title & Trust Company did some bond work for Bank and that Bank's president was connected with that company. (Tr. 73; 147) Yet he did not inquire of Bank's president, or anyone, as to the rights of Surety to the proceeds of the Contract. (Tr. 73; 156) Bank's president was well aware of those rights. (Tr. 174-175)

Bank Received Proceeds With Notice

The proceeds of the Contract were received by Bank from the Government on December 15, 1952. (Tr.

53) In paragraph III of its Complaint Surety alleges that as a condition precedent to and as part of the consideration for Surety's undertaking, Contractor assigned to Surety ". . . all moneys and properties that may be due and payable to the contractor at the time of any breach or default in said contract..." (Tr. 5-6) In paragraph IX of its Complaint Surety alleges as follows (Tr. 10):

"At the time it received the aforesaid sum of \$12,580.00 from the Government, the Bank knew, or in the exercise of reasonable diligence should have known, that said sum represented the amount due on the aforesaid contract and that the Contractor was in default in that he had failed promptly or at all to make payment to all persons who had supplied labor and material for the prosecution of the work provided for in the contract with the Government."

Paragraph IX of Bank's Answer *admits* the allegations of paragraph IX of the Complaint. (Tr. 17)

In *California Bank v. United States Fidelity & Guar. Co.* (C.C.A. 9), *supra*, 129 Fed. (2d) 751, 755, the court said:

"* * * At the time it received the \$12,114.34, appellant knew that Anderson had received it from the United States under the aforesaid contracts; but appellant had no notice or knowledge of Anderson's default until July 19, 1938—nineteen days after it received the \$12,114.34. Thus appellant received the \$12,114.34 without notice or knowledge that it was part of a fund in which appellee had, or might thereafter acquire, a superior right. We hold, therefore, that appellee is not entitled to recover any part of the \$12,114.34 from appellant."

Here, Bank knew that Contractor was in default when it received the Contract proceeds. Thus it did have notice or knowledge that they were part of a fund in which Surety had, or might thereafter acquire, a superior right. See also *Labbe v. Bernard* (Mass.), 82 N.E. 688.

Bank cannot now be heard to say it was ignorant of Surety's rights. With knowledge of the facts outlined above, it was put upon inquiry as to those rights. *Haverstick v. Sheirich* (Pa.), 155 Atl. 859, 76 A.L.R. 912; *Royal Indemnity Co. v. United States* (Ct.Cl.), 93 Fed. Supp. 891; *National Surety Corporation v. United States* (Ct.Cl.), 133 Fed. Supp. 381.

II

Surety May Recover Contract Proceeds From Bank, A Subsequent Assignee With Notice

The judgment of the trial court and the theory upon which it was rendered are correct and should be affirmed. We respectfully submit however that the judgment should also have been rendered on the theory advanced by Surety in its proposed findings of fact numbered 10(j) and 12, and its proposed conclusions of law numbered I and II. (Tr. 23-25; 26) We do not attack the judgment or ask that it be altered or modified in any way. We do urge that there was an additional legal reason supporting the judgment which the trial court should have adopted. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 57 S.Ct. 325, 81 L.Ed. 593.

Surety's proposed conclusion of law No. I reads as follows (Tr. 26):

"At the time Contractor assigned the proceeds of the Contract to Bank there existed a valid prior assignment of the contract proceeds by Contractor to Surety."

The trial court found that as a condition precedent to and as part of the consideration for the execution of the performance bond and the payment bond Contractor executed and delivered to Surety an application wherein Contractor assigned to Surety any and all moneys that might be due and payable to Contractor at the time of any breach or default in the Contract to indemnify Surety for any liability Surety might incur by reason of having executed the performance bond and the payment bond. (Tr. 50)

Defendant argues that Surety's application was for a perform-

ance bond, not a payment bond, that since the Contract was fully performed there was never any breach or default and that therefore, Surety never had any assignment. This argument does not perceive the true reasoning of the trial court in finding the fact above mentioned and refusing Surety's proposed conclusion of law No. I.

It is true the printed language of the form (Tr. 127-130) indicates that it is an application for a performance bond. Unfortunately the entire record is not before this Court. It should therefore be presumed that the evidence supported the trial court's finding.

3 *Am. Jur., Appal and Error*, Sec. 954, p. 516-518

It is apparent however, even from the record before this Court, that the application and its provisions were intended by Surety and Contractor to, and did in fact, apply to both the performance bond and the payment bond. The Contract price was in the original sum of \$12,180. (Tr. 49) Both the Contract and the Miller Act (40 U.S.C.A. § 270a) required the Contractor to furnish a payment bond and a performance bond, each in the sum of one-half the Contract price. (Tr. 49-50) The "Contract Bond" referred to in the application was in the sum of \$12,180.00; no other application was made. No bond was ever executed in the sum of \$12,180.00. The performance bond and the payment bond executed by Surety were in the sum of \$6,090.00 each. (Tr. 50)

Surety's Assignment Valid

While the Contract contained no express provision for payment of the Materialmen, it expressly required Contractor to furnish a payment bond which, pursuant to the Miller Act, was conditioned that Contractor should promptly make payment to the Materialmen. Thus the payment bond was very much a part of the Contract and when, on and prior to October 20, 1952 (the completion date), Contractor had failed promptly, or at all, to make payment to the Materialmen it was in default under the provisions of the Contract and the payment bond. The trial court

properly so concluded. (Tr. 53-54) As shown above, Bank admits that when it received the Contract proceeds on December 15, 1952 it knew, or in the exercise of reasonable diligence should have known, that Contractor was in default.

The trial court refused to conclude that Surety had a valid prior-existing assignment because Surety is not a bank, trust company or other financing institution and did not comply with the Assignment of Claims Act of 1940, 31 U.S.C.A. § 203, 41 U.S.C.A. § 15. We think the trial court was wrong in this regard.

It is true the Anti-Assignment Statute, 31 U.S.C.A. § 203, declares assignments of claims against the Government before their allowance to be "absolutely null and void". But this Statute is for the protection of the Government only. It is well settled that notwithstanding the provisions of the Anti-Assignment Statute, an assignment by a Contractor to his Surety of the proceeds of a Government contract is valid and enforceable as between the surety and a subsequent assignee of the contractor. *Martin v. National Surety Co.*, 300 U.S. 588, 57 S.Ct. 531, 81 L.Ed. 822; *California Bank v. United States Fidelity & Guar. Co.* (C.C.A. 9), *supra*, 129 Fed. (2d) 751.

The Assignment of Claims Act of 1940 merely lifted the bans set up by the Anti-Assignment Statute and authorized the Government to recognize an assignment to a bank, trust company or other financing institution where the contract proceeds exceed \$1,000.00. It gave the classified assignees a new right against the Government; but it did not give them any new or greater rights as against a prior assignee, such as the Surety. *Royal Indemnity Co. v. United States* (Ct.Cl.), *supra*, 93 Fed. Supp. 891.

Consequently a surety to whom the contractor has assigned the proceeds of a Government contract may recover those proceeds from a subsequent assignee who receives them with notice of prior assignment. *Martin v. National Surety Co.*, *supra*, 300 U.S. 588, 57 S.Ct. 531, 81 L.Ed. 822; *California Bank v. United States Fidelity & Guar. Co.* (C.C.A. 9), *supra*, 129 Fed. (2d) 751;

Pacific Indemnity Co. v. Grand Ave. State Bank of Dallas (C.A. 5), 223 Fed. (2d) 513; *Restatement of Contracts*, Sec. 173.

Actual Notice Not Required Bank relies upon the fact that it had no actual notice of Surety's assignment when it received the Contract proceeds. Actual notice is not required.

The Arizona Supreme Court has repeatedly held that in the absence of conflicting statutes or decisions it will follow the Restatement. *Collins v. O'Connell* (C.C.A. 9), 136 Fed. (2d) 141. The *Restatement of Contracts*, Sec. 174, provides that an assignee "for value in good faith without notice" is not subject to latent equities in favor of another; and the comment to this section refers to Sec. 166, Comment b. Comment b under Sec. 166, together with the first illustration thereof, reads as follows (page 210):

"b. The promisee's right, moreover, is defeasible by a subsequent assignment to a bona fide purchaser for value without notice of the prior right, in this respect differing from a present assignment of a future right (see § 154). What is meant by 'value' and by 'notice' in the phrase bona fide purchaser for value without notice is not always identical in different kinds of transactions. The law regarding this is stated in the Restatement of Trusts. *Illustrations*:

1. A promises B, in consideration of a horse sold to him by B, that A will thereafter assign to him money which will fall due to A from C under an existing employment. A subsequently assigns for value the right to D, *who neither knows nor has reason to know of the previous promise*. B learns of this assignment and thereafter collects the money when due from C. B acquires no right against C or power to discharge C and therefore D can recover from B the money so collected or can get judgment against C." (emphasis supplied)

The *Restatement of Trusts*, Sec. 297, as well as the *Restatement of Agency*, Sec. 9(1), the *Restatement of Restitution*, Sec. 174a, and the *Restatement of Torts*, Sec. 757, all provide that a person has notice of a fact when he knows it, has reason to know it or should

know it. Nowhere in the Restatement is the term "notice" confined to mean actual notice. *Restatement in the Courts, Permanent Edition*, page 82.

As indicated by the Restatement, a subsequent assignee, in order to avoid the rights of others, must be a bona fide purchaser for value in good faith without notice. The Arizona Supreme Court in the early case of *Luke v. Smith*, 13 Ariz. 155, 108 Pac. 494, 496 (Aff'd. 227 U. S. 379, 33 S. Ct. 356, 57 L. Ed. 558) held:

"* * * Where one has notice of a fact affecting property which he seeks to purchase, which puts him upon inquiry, he is chargeable with the knowledge which the inquiry, if made, would have revealed; and one is put upon inquiry by notice of a claim which is inconsistent with the title he seeks to obtain, and must exercise due diligence to ascertain the facts upon which the claim is based. In *Fidelity Company v. Railroad Co.*, 32 W. Va. 244, 9 S. E. 180, it is said that: 'Whatever is sufficient to put a person on inquiry is considered as conveying notice; for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him. When a subsequent purchaser has actual notice that the property in question is incumbered or affected, he is charged constructively with notice of all the facts and instruments, to the knowledge of which he would have been led by inquiry into the incumbrance or other circumstances affecting the property of which he had notice.'"

The rule was reiterated in *Davis v. Kleindienst*, 64 Ariz. 251, 169 Pac. (2d) 78, 83 as follows:

"* * * The law seems to be settled that a person who fails to exercise due diligence to avail himself of information which is within his reach is not a bona fide purchaser. *University of Richmond v. Stone*, 148 Va. 686, 139 S. E. 257. Thus a purchaser who has brought to his attention circumstances which should have put him on inquiry which if pursued with due diligence would have led to knowledge of an adverse interest in the property, is not a bona fide purchaser."

See also *Maricopa Utilities Co. v. Cline*, 60 Ariz. 209, 134 Pac. (2d) 156 and *Hillman v. Busselle*, 66 Ariz. 139, 185 Pac. (2d) 311.

In *Haverstick v. Sheirich* (Pa.), supra, 155 Atl. 859, 76 A.L.R. 912, the bank likewise contended it had no actual knowledge of the surety's rights. The court said (76 A.L.R. 915-916):

"* * * The bank cannot rest upon the contention that it did not in fact know of these things; it was put upon inquiry regarding them, and, inquiry having become a duty, it was bound by all it would have ascertained that it duly inquired. It knew, for it was bound to know, that the statute, the contract, and the bond made the rights of the materialmen and workmen paramount to those of the contractor, and that upon these provisions the materialmen, workmen, and surety had the right to rely. Nothing that the bank could do could alter that status, and its rights rise no higher than those of the contractor. It is not disputed that the bank was affected with notice that there was a surety, which became liable to pay the materialmen and workmen if the contractor did not. This liability being statutory, and known by the bank to be so, *common prudence called upon it, before it made its loan, to inquire into the circumstances under which the surety assumed that liability.* * * *" (emphasis supplied)

Likewise in *Royal Indemnity Co. v. United States* (Ct. Cl.), supra, 93 Fed. Supp. 891, 894 the court held:

"Payment and performance bonds are required by the Miller Act of all Government contractors. The bank is charged with knowledge of this law. It took its assignment and advanced its money after the contract had been entered into between the contractor and the United States. *It is apparent that the bank knew of the surety's interest in the transaction or was, at the very least, put upon notice as to the possibility of an equity possessed by the surety in the proceeds of the contract.* The contract between the contractor and the surety clearly created in the surety an equity in any proceeds of the contract. This equity could be dissolved only when the contractor had met all the obligations secured by the bonds." (Emphasis supplied)

This rule was reaffirmed in *National Surety Corporation v. United States* (Ct. Cl.), supra, 133 Fed. Supp. 381.

At the time it received the proceeds of the Contract Bank knew

that Contractor had furnished a payment bond and that Surety would have to pay the Materialmen if Contractor failed to do so; it knew that Contractor had failed promptly, or at all, to pay some of the Materialmen; admittedly, it knew, or in the exercise of reasonable diligence should have known, that Contractor was in default under the provisions of the Contract and the payment bond. Surety's rights to the proceeds of the Contract had matured through the Contractor's default prior to Bank's assignment and long prior to its receipt of those proceeds. Bank cannot now hide behind its lack of actual knowledge of Surety's assignment. It was put upon inquiry, and had it made the least inquiry of its own president or of Surety it would have learned of the assignment and Surety's rights. Bank is therefore charged with notice of Surety's assignment and its rights to the Contract proceeds. *Pacific Indemnity Co. v. Grand Ave. State Bank of Dallas* (C.A. 5), supra, 223 Fed.(2d) 513. For these reasons the trial court should have found in accordance with Surety's proposed findings of fact numbered 10(j) and 12, that at the time the assignment to it was executed and at the time it received the Contract proceeds Bank knew or in the exercise of reasonable care and diligence should have known that "Contractor had previously assigned the proceeds of the Government contract to Surety".

Also, for the foregoing reasons the trial court should have sustained Surety's proposed conclusion of law No. II as follows (Tr. 26):

"The rights of Surety under the prior assignment are superior to the rights of Bank which procured the execution of the subsequent assignment and received the proceeds of the Contract with notice of the prior assignment and the rights of Surety."

III

Bank Holds Contract Proceeds as Constructive Trustee for Benefit of Surety

When Contractor applied for the loan it showed Bank a copy of the Contract and Bank inquired as to what the money was needed

for. Contractor replied. "To pay for materials and labor on this job, part of it I am just finishing up and I want to clear up all the bills on it." (Tr. 136) Thus the loan was made for the avowed purpose, in part at least, to pay the Materialmen. Bank knew Contractor was having financial difficulty and could not pay the Materialmen except out of the proceeds of the Contract or the proceeds of Bank's loan. (Tr. 51-52) Yet prior to receiving the Contract proceeds Bank made no inquiry to determine how much was due the Materialmen (Tr. 73) or whether Contractor had actually used the loan proceeds to pay them. (Tr. 74-75)

In fact none of the loan proceeds were used in payment of the Materialmen. (Tr. 53) They were diverted by the Contractor to some other purpose. At the time it received the Contract proceeds Bank knew that Contractor had furnished a payment bond and that the Surety thereon would have to pay the Materialmen if Contractor failed to do so. At that time Bank also knew, or in the exercise of reasonable care and diligence should have known, that Contractor was in default under the provisions of the Contract and the payment bond. This Bank admits.

Under the authorities above cited Bank cannot now be heard to say it had no actual notice of Surety's rights. With knowledge of the above facts it was bound to know Surety had some rights, and it was put upon inquiry to determine the nature and extent of those rights. Having failed to do so, it now holds the Contract proceeds in constructive trust for the benefit of Surety. *Labbe v. Bernard* (Mass.), supra, 82 N.E. 688; *Pacific Indemnity Co. v. Grand Ave. State Bank of Dallas* (C.A. 5), supra, 223 Fed.(2d) 513; *Restatement of Restitution*, Sec. 168.

Bank has foreclosed itself on this point by the following admission on page 25 of its Brief:

"* * * Knowing the source of the money, the creditor is bound to know that the Miller Act has required the Contractor to execute a Performance Bond, which bond must, according to law, provide for the protection of laborers and materialmen; the creditor is bound to know that if the laborers

and materialmen are not paid the Surety must pay them; therefore the creditor must ascertain at his peril whether or not there are any outstanding obligations of the Contractor to the laborers and materialmen before accepting payment, else he assumes the obligations of the compensated Surety to the extent of the payment received."

A bank with knowledge of the facts that Bank knew when it received the Contract proceeds should not be permitted to thumb its nose at those facts and later shield itself behind the veil of ignorance. If that were condoned by the law the courts would pave the way for unscrupulous contractors to divert the proceeds of Government contracts from the persons equitably entitled thereto. For in every instance such contractors could borrow a sum equal to the contract proceeds from a bank, assign the proceeds to the bank and then abscond with or use the money borrowed for some purpose wholly unconnected with the contract. This would leave the surety to pay laborers and materialmen without any means of protection or exoneration whatsoever.

The trial court properly concluded (Tr. 54):

"Contractor held its right to the proceeds of the Contract, subject to an equitable lien in favor of Surety; when it transferred its right to Bank, Bank took the proceeds of the Contract subject to Surety's equitable lien."

This conclusion is in accord with the spirit and the reasoning of the cases above cited.

CONCLUSION

Under any one, or all, of the authorities advanced above: subrogation, prior assignment and constructive trust, Surety's rights to the Contract proceeds are superior to those of Bank. The judgment of the lower court should therefore be affirmed.

Respectfully submitted,

MOORE & ROMLEY

ELIAS M. ROMLEY

JARRIL F. KAPLAN

Phoenix, Arizona

Attorneys for Appellee



No. 14,903

In the
United States Court of Appeals
For the Ninth Circuit

THE BANK OF ARIZONA,
a Corporation,

Appellant,

vs.

NATIONAL SURETY CORPORATION,
a Corporation,

Appellee.

Appellee's Petition for Rehearing

FILED

MOORE & ROMLEY

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PAUL P. O'BRIEN, CLERK

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In the

United States Court of Appeals

For the Ninth Circuit

THE BANK OF ARIZONA,
a Corporation,

Appellant,

vs.

NATIONAL SURETY CORPORATION,
a Corporation,

Appellee.

Appellee's Petition for Rehearing

*To the Honorable Homer T. Bone and Albert L. Stephens,
Judges of the United States Court of Appeals for the
Ninth Circuit, and to the Honorable Louis E. Goodman,
Judge of the United States District Court, Northern
District of California:*

Appellee respectfully petitions for a rehearing in the above cause to the end that the judgment of this Court that appellee take nothing by its amended complaint and that costs be awarded appellant, be vacated and the judgment of the lower court affirmed.

GROUND'S FOR REHEARING

Appellee respectfully urges that the opinion and judgment are erroneous and contrary to law, and that a rehearing should be granted, for three reasons:

1. The Court has incorrectly assumed that appellant had no knowledge of the contractor's default by failure to pay materialmen until after it had already received the contract proceeds from the government, and this erroneous assumption of fact formed the basis of the Court's decision. The fact thus assumed by the Court is contrary to appellant's admission and to the findings of fact made by the lower court.

2. The Court has misunderstood appellee's position in stating that "It appears to be Surety's position that while 31 U.S.C.A. § 203 precludes the assignment contained in the application for contract bond from being a lawful assignment it was nonetheless *effective as an equitable assignment*, relying upon *Martin v. National Surety Co.*, 1936, 300 U.S. 588, and is therefore valid as between Surety and parties taking later assignments with notice of the prior assignment to Surety." Opinion, page 9. Appellee contends that under the rulings of the United States Supreme Court and this Court as well, the assignment in the bond application is lawful and valid as to anyone other than the Government. It is not merely an equitable assignment; it is also a legal assignment as far as appellant is concerned.

3. The Court has failed to consider and pass upon appellee's assertion, which we earnestly contend is valid under the authorities, that appellant holds the contract proceeds as a constructive trustee for the benefit of appellee.

ARGUMENT

- I. **At the Time Appellant Received the Contract Proceeds from the Government, It Knew That Contractor Was in Default in That He Had Failed Promptly or at All to Make Payment to the Materialmen.**

The lower court awarded judgment in favor of appellee and against appellant for the sum of \$6,090.00. On this appeal, appellee contended that it was entitled to the judgment upon any one or all of three bases—subrogation, prior assignment and constructive trust.

SUBROGATION

In its opinion, this Court has concluded that after the Government paid the contract proceeds to appellant it no longer had any rights which appellee could acquire by subrogation. Underlying this conclusion is the assumption of fact (Opinion, page 2) that "Receipt of this form of acknowledgment subsequent to December 23, 1952 was the first knowledge Bank had of Contractor's *failure to pay materialmen*." This assumption is contrary to paragraph 13 of the findings made by the lower court (Tr. 45):

"13. The proceeds of the Government contract (\$12,580.00) were received by Bank from the Government on December 15, 1952. At that time the Bank knew that Contractor had not paid all materialmen, and Bank made no effort to see to it that loan proceeds were used by Contractor to pay the Materialmen or to discover that in fact Contractor had used none of the loan proceeds to pay the Materialmen."

Furthermore, paragraph IX of appellee's amended complaint (Tr. 10), which is *admitted* by paragraph IX of appellant's answer (Tr. 17), alleges as follows:

"IX.

"At the time it received the aforesaid sum of \$12,580.00 from the Government, the Bank knew, or in the

exercise of reasonable diligence should have known, that said sum represented the amount due on the aforesaid contract and that the Contractor was in default in that he had failed promptly or at all to make payment to all persons who had supplied labor and material for the prosecution of the work provided for in the contract with the Government."

The admission by appellant that it knew or "in the exercise of reasonable care and diligence should have known" that the Contractor was in default by failure to make payment to materialmen, is highly significant. At the time appellant made the loan to the Contractor and took its assignment of the contract proceeds, appellant knew that materialmen had not been paid. The stated purpose of the loan was to enable the Contractor to make such payment (Findings of Fact paragraph 10, Tr. 43; Tr. 136). At that time appellant also knew that bonds had been furnished the Government, and that if the Contractor failed to pay materialmen the Surety on those bonds would have to do so (Findings of Fact, paragraph 10, Tr. 43-44). Appellant concedes that under these circumstances "the creditor must ascertain at his peril whether or not there are any outstanding obligations of the Contractor to the laborers and materialmen before accepting payment, else he assumes the obligations of the compensated Surety to the extent of the payment received" (Brief for Appellant, page 25).

In consequence of the Contractor's default, the contract proceeds became a fund which the Government was entitled to apply in payment of the materialmen, and which appellee, as subrogee of the Government, was entitled to have applied in reimbursement of the funds expended by it in payment of the materialmen. *California Bank v. United States Fidelity & Guar. Co.*, (C.C.A. 9), 129 Fed. (2d) 751, at page 754.

And appellee's right of subrogation relates back to the date of the contract bonds. *California Bank*, at page 755. Certainly "the doctrine of relation cannot be used by a subrogee for the purpose of recovering money paid to a creditor without notice, in satisfaction of a just debt, prior to the maturing of any right of subrogation." *California Bank*, at page 755. But in this case Bank knew of the Contractor's default when it received the contract proceeds from the Government, and therefore appellant received the proceeds with "notice or knowledge that it was part of a fund in which appellee had, or might thereafter acquire, a superior right." *California Bank*, at page 755. See Brief of Appellee, pages 4-6.

ASSIGNMENT

This Court has held that appellee's rights under the assignment contained in the bond application are inferior to those of appellant under a subsequent assignment" * * * for here, as in that (*California Bank*) case, Bank took the assignment and received the proceeds before it had notice or knowledge of the failure of Contractor to pay materialmen, and had no notice of the prior assignment (not perfected under 31 U.S.C.A. § 203) to Surety." Opinion, pages 10-11.

While in this case appellant had not actual notice of appellee's assignment when appellant received the contract proceeds, "The fact that Bank knew that bonds had been furnished the Government confirms Surety in its contention that Bank was 'put on inquiry', and that had Bank inquired it would have learned of the assignment and of Surety's interest in the contract proceeds." Opinion, page 9. Nevertheless the Court concluded that appellee may not recover from appellant by any right it may have under the prior assignment because the Court again erroneously as-

sumed that "The evidence shows that it was not until Bank received Surety's response (dated December 23, 1952) to this notice of assignment that Bank had knowledge of the default in payment by Contractor to materialmen." Opinion, page 8.

The fact is, as the Court states, appellant was put on inquiry to determine appellee's rights, and had it inquired it would have learned of the assignment and appellee's interest in the contract proceeds. The fact is, as the lower court found, that when appellant received the contract proceeds it knew that the Contractor was in default in that he had failed promptly or at all to make payment to the materialmen. Appellant therefore holds the contract proceeds subject to appellee's rights under the prior assignment.

SUMMARY

We agree with the Court that its decision in this case should rest upon its holding in the *California Bank* case, supra. But the Court has incorrectly assumed the facts to be the same in both cases, when actually the reverse is true. It appears that the conclusions with regard to appellee's rights under the doctrine of subrogation and under the prior assignment were based on the Court's belief that appellant had no notice or knowledge of the Contractor's default in payment of the materialmen until after it had received the contract proceeds.

The lower court found that at the time appellant received the contract proceeds, it knew materialmen had not been paid. Appellant admitted that it knew, or should have known, of the default when it received the contract proceeds. It is therefore apparent that a mistake has been committed. When the true fact is realized, appellee is entitled to recover the contract proceeds under the principles of the *California Bank* case.

II. The Assignment in the Bond Application Is Lawful and Valid as to Appellant.

Although it may not have so intended, this Court has inferred that the assignment contained in the bond application is invalid not only as to the Government, but as to appellant as well, because it "falls within the censure of 31 U.S.C.A. § 203." Opinion, pages 8, 9, 10-11. The court has said that "It appears to be Surety's position that while 31 U.S.C.A. § 203 precludes the assignment contained in the application for contract bond from being a lawful assignment it was nonetheless effective *as an equitable assignment*, relying upon *Martin v. National Surety Co.*, 1936, 300 U.S. 588, and is therefore valid as between Surety and parties taking later assignments with notice of the prior assignment to Surety." Opinion, page 9.

The validity of the assignment in the bond application was discussed in the Brief of Appellee, pages 7-9. Appellee most certainly does not contend that the assignment is precluded from being a lawful one or that it is merely effective as an equitable assignment. The law is otherwise. The Anti-Assignment Statute (31 U.S.C.A. § 203) was enacted solely for the protection of the Government. Notwithstanding its provisions, an assignment by a contractor to his surety of the proceeds of a Government contract is a valid, legal and enforceable assignment as between the surety and a subsequent assignee of the contractor. Nor does compliance by the subsequent assignee with the Assignment of Claims Act of 1940 (31 U.S.C.A. § 203) give more validity to the subsequent assignment insofar as the surety is concerned. It merely gives the subsequent assignee a right against the Government which the surety does not have.

The foregoing principles are supported by the following cases: *Martin v. National Surety Co.*, 300 U.S. 588, 57 S.Ct.

531, 81 L.Ed. 822; *California Bank*, at page 753; *Royal Indemnity Co. v. United States*, 93 F.Supp. 891.

Appellant knew of the Contractor's default when it received the contract proceeds and appellant was put on inquiry to determine appellee's rights thereto. Had appellant inquired it would have learned of the prior assignment to appellee. Thus having constructive notice of appellee's assignment at the time it received the contract proceeds, appellant may not retain them under the above-mentioned authorities and *Pacific Indemnity Co. v. Grand Ave. State Bank of Dallas* (C.A. 5), 223 Fed.(2d) 513.

III. Appellant Holds the Contract Proceeds in Constructive Trust for the Benefit of Appellee.

The Court has failed to consider and pass upon appellee's contention (Brief of Appellee, pages 12-14) that appellant holds the contract proceeds in constructive trust for the benefit of appellee. This principle alone is sufficient to affirm the judgment of the lower court.

The significant facts, admitted by appellant, are these: when it received the contract proceeds, appellant knew that bonds had been furnished the Government, that the surety on the bonds would have to pay the materialmen if the Contractor failed to do so and that the Contractor was in default in that he had failed promptly or at all to pay the materialmen.

This Court has correctly held that appellant was put on inquiry as to appellee's rights, and had appellant inquired it would have learned of the prior assignment to appellee and appellee's interest in the contract proceeds. When appellant received the contract proceeds, it knew, or should have known, that it was receiving funds of which the Contractor was not the equitable owner. The contract proceeds

are therefore impressed with a constructive trust in favor of appellee.

This case falls squarely within the recent decision of the Fifth Circuit in *Pacific Indemnity Co. v. Grand Ave. State Bank of Dallas*, 223 Fed. (2d) 513.

The failure of the Court to consider this issue must have been through inadvertence.

CONCLUSION

The problems presented by this case were somewhat complicated and we appreciate that they were given long and careful consideration before a decision was reached. The decision made, however, is founded on a mistaken belief as to a vital fact, a misunderstanding of appellee's position, and a failure to consider a very important issue.

We strongly urge the Court to reconsider its decision in the light of the matters herein presented; and upon such reconsideration we ask that a rehearing be granted.

Respectfully submitted,

MOORE & ROMLEY

By ELIAS M. ROMLEY

JARRIL F. KAPLAN

Attorneys for Appellee

CERTIFICATE OF COUNSEL

In my judgment the foregoing Petition for Rehearing is well founded. I hereby certify that it is not interposed for delay.

Dated, September 27, 1956, Phoenix, Arizona.

JARRIL F. KAPLAN

No. 14,904

IN THE
United States Court of Appeals
For the Ninth Circuit

WILLIE RAY SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LLOYD H. BURKE,

United States Attorney,

By ROBERT E. WOODWARD,

Assistant United States Attorney,

404 Federal Building,

Sacramento 6, California,

Attorneys for Appellee.

FILED

MAR 23 1956

PAUL P. O'BRIEN, CLERK

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QUESTION ON APPEAL.

Appellant sets forth his position for appeal as being the lack on the part of the defendant of the specific intent to steal the car and transport it thereafter.

ARGUMENT.

I.

STATUTORY INTENT WAS DETERMINED BY JURY UNDER PROPER INSTRUCTIONS.

Section 2312 of Title 18 USC, the interstate transportation of a stolen motor vehicle act, does require a showing that a defendant to be guilty knew the automobile was stolen and intended to transport it interstate with such knowledge. That is a question of fact, which, under proper instructions was left to the jury and determined to be present in the mind of the defendant by the jury when it returned a verdict of guilty. Actually, this fact alone indicates that there is no merit to this appeal, as no error in the instructions is claimed.

II.

APPELLANT'S CASES ARE NOT IN POINT.

Appellant has cited a number of cases and we have no quarrel with them as such. It is appellee's contention that they are not pertinent to the issue raised,

and a discussion of them, case by case, to set forth their inapplicability would not be of assistance to the Court. Suffice it to say the facts in *Hite v. U. S.*, 168 F. 2d 973 point this out, since both title and possession were intended to pass to the defendant, who was charged with violation of Section 2312, Title 18, United States Code. Substantially, the facts in the other cases cited are as inappropriate.

III.

**APPELLANT KNEW RIGGS HAD POSSESSORY INTEREST ONLY
AND THAT TITLE TO THE AUTOMOBILE WAS IN ANOTHER.**

The government witness Roy A. Riggs, who, in effect, was substantiated by Special Agent Nathan White, testified that he held a possessory interest in the automobile in question as a conditional purchaser. There is no question but what the Budget Finance Company held title under this contract and appellant knew this. Appellant was to return the automobile to the Budget Finance Company at Phoenix, Arizona, from Oklahoma where it had been taken by appellant at Riggs' request. Riggs testified, and we must assume his testimony to be true since the jury evidently accepted it, (*Collier v. U. S.*, 190 F. 2d 473, 476) that he was paid nothing by the appellant and it was understood the car should be returned to Budget Finance Company and then if appellant desired to take over the payments that was

a matter strictly up to the legal owner, Budget Finance Company.

IV.

ASSUMING APPELLANT HAD NO GUILTY INTENT AT THE TIME HE CAME INTO LIMITED POSSESSION OF THE AUTOMOBILE, HIS INTENT TO STEAL WHEN HE WENT BEYOND THE SCOPE OF HIS AUTHORITY MAY BE INFERRED AND TRANSPORTATION INTERSTATE THEREAFTER IS A VIOLATION OF THE STATUTE IN QUESTION.

A. It thus is obvious, for the purposes of this case, that the appellant had lawful possession of the automobile but for a limited purpose; i.e., delivery of the automobile to Budget Finance Company at Phoenix, Arizona. The evidence is undisputed that appellant took the automobile to Phoenix, Arizona; that he did not contact Budget Finance Company, but drove the automobile thousands of miles over most of the United States in driving it to Alabama and return by a circuitous route. During the course of this trip the Arizona license plate was changed to that of Missouri and another plate belonging to the co-defendant was also found in the car.

B. During all of this time, appellant had possession of the Conditional Sales Contract and knew two payments were due on the automobile. Upon return to Phoenix after this extended trip appellant did not contact Budget Finance Company, his second opportunity.

C. When appellant received possession of the automobile from Roy A. Riggs to deliver it to Arizona, appellant may or may not have had criminal intent to steal the automobile and it is not necessary that such a showing be made. For if the appellant intended to convert the automobile to his own use before he came into this District, he is guilty of transporting the motor vehicle in interstate commerce as charged. (*Davilman v. U. S.*, 180 F. 2d 284, 285; *Breece v. U. S.*, 218 F. 2d 819; *Collier, et al. v. U. S.*, 190 F. 2d 473; *Wilson v. U. S.*, 214 F. 2d 313.)

D. The narrow definition of larceny sought to be followed by appellant in citing cases such as *Hite v. U. S.*, 168 F. 2d 973 is inappropriate from two viewpoints.

1. The better reasoning is contained in such cases as *Davilman v. U. S.*, *supra*, which take a more liberal view in interpreting "larceny" as it pertains to Section 2312, and

2. Because such cases presuppose the intent on the part of the one giving possession to the person accused to part with title as well.

E. Here, Riggs had no title with which to part and appellant was well aware Riggs held only a possessory interest. It must be remembered appellant might qualify as an expert in such matters, as he had been previously convicted of four felonies consisting of grand theft, conviction under this same Statute then known as the "Dyer Act," and two separate convictions for theft of automobiles.

The appellant was but a bailee, who, at the time he obtained possession, may have had the criminal intent to steal the automobile which was entrusted to him. Being charitable, we may assume he has no criminal intent at that time. But his intent to appropriate the automobile to his own use is shown by his actions in returning to Phoenix, ignoring his instructions as bailee, and driving across the country. If this is not enough, his return to Phoenix the second time and the departure to California where he was arrested can leave no doubt, reasonable or otherwise, as to his state of mind. Judge Augustus Hand in *U. S. v. Sicurella, et al.*, 187 F. 2d 533, 534, an analogous case, neatly defines common law "larceny", as follows:

"Moreover, it was always larceny when there was an intent at the time a bailee acquired possession of the property of another to convert it to his own use and the bailee thereafter did convert it and the owner had given over the property with no intention that title should pass. See e.g., *Hite v. United States*, 10 Cir., 168 F. 2d 973; *United States v. Patton*, 3 Cir., 120 F. 2d 73; *Reg. v. Ashwell*, 16 Q.B.D. 190."

Here, Riggs held only a possessory interest and could not pass title, even if he so desired. Appellant knew this. It is axiomatic that though possession originally may have been lawful, a guilty intention by the bailee to appropriate the subject matter of his bailment and its appropriation is larceny at that time.

CONCLUSION.

Appellee respectfully submits that the order appealed from was properly based upon the law and the evidence and that it should be affirmed.

Dated, Sacramento, California,
March 19, 1956.

LLOYD H. BURKE,

United States Attorney,

By ROBERT E. WOODWARD,

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Attorneys for Appellee.

No. 14905

**United States
Court of Appeals**
For the Ninth Circuit

ALFREDO RAMIREZ GARCIA,
Appellant,
vs.

HERBERT BROWNELL, Attorney General of the
United States, and ALBERT DEL GUERCIO,
Officer in Charge Immigration & Naturalization
Service at Los Angeles, California,
Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

No. 14905

United States
Court of Appeals
For the Ninth Circuit.

ALFREDO RAMIREZ GARCIA,
Appellant,

vs.

HERBERT BROWNELL, Attorney General of the
United States, and ALBERT DEL GUERCIO,
Officer in Charge Immigration & Naturalization
Service at Los Angeles, California,
Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern District of
California, Central Division

Civil Action No. 18130

ALFREDO RAMIREZ GARCIA,

Petitioner,

vs.

HERBERT BROWNELL, Attorney General of the
United States, and ALBERT DEL GUERCIO,
Officer in Charge, Immigration and Naturaliza-
tion Service at Los Angeles, California.

PETITION FOR DECLARATORY JUDGMENT
AND FOR DETERMINATION OF UNITED
STATES CITIZENSHIP

Petitioner complains and alleges:

I.

That Herbert Brownell is the Attorney General of the United States and the head of the Department of Justice, Immigration and Naturalization Service. That Albert Del Guercio is the Officer in Charge of said Immigration and Naturalization Service and the head of such Service at Los Angeles, California.

II.

Jurisdiction is invoked pursuant to section 360(a) of Public Law 414, Section 2201, Title 28, U.S.C.A., and Article III and the fourteenth amendment of the Constitution of the United States. [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

Petitioner, Alfredo Ramirez Garcia, was born at Gardena, Los Angeles County, California, on the 27th day of March, 1926.

IV.

Petitioner contends and alleges that he is now, and ever since the date of his birth has been, a constitutional citizen of the United States pursuant to the fourteenth amendment of the Constitution of the United States.

V.

When seven years of age your petitioner was taken by his father, Francisco Ramirez, and mother, Petra Garcia, to Villa Santiago, Gto., Republic of Mexico. That petitioner continued to reside at said place in the Republic of Mexico until in or about the year 1943 in October, at which time he journeyed to Tijuana, Republic of Mexico, and requested permission from the officers of the United States Immigration and Naturalization Service at San Ysidro, California, the port of entry into the United States from the Republic of Mexico, to enter the United States, claiming that he was a native-born citizen of the United States, and in support thereof presented his baptismal certificate, which certificate indicated that petitioner was born at Gardena, California, on the 27th day of March, 1926.

VI.

That at said time and place your petitioner was denied the right to enter the United States by said

officers of the Immigration and Naturalization Service; that said officers stated that they would consider his request to enter the United States if and when he presented an official birth certificate issued by the State of California. That thereafter, on several occasions, your petitioner made further demand and request of said Immigration officers for permission to enter the United States, and on each of said occasions was denied such admission. [3]

VII.

Petitioner alleges that he attended three years approximately of schooling in the Republic of Mexico; that he was not possessed of sufficient knowledge or information as to how or in what manner he could obtain his certificate of birth, and that he is or was at the time unable to read or write the English language. That after repeated attempts to enter the United States and being denied such right of entry, and not having any knowledge of the existence of any birth certificate or the manner or means of acquiring the same, he inquired of friends in the Republic of Mexico as to how he could secure a copy of his birth certificate, and was informed that when they came to the United States they would make inquiry on his behalf and attempt to secure a copy of said birth certificate for him. That such persons did secure a copy of petitioner's birth certificate for him during the year 1946; that thereafter, and on or about the 1st day of July, 1946, your petitioner presented said birth certificate to the officers of the said Immigration and Naturalization Service at Tijuana and was thereupon permitted

to enter the United States, and did enter the United States at said time as a native-born citizen of the United States.

VIII.

That immediately upon petitioner's entry into the United States he registered under the Selective Service and Training Act during the month of July, 1946, at Compton, California, before the local board of said district; that thereafter your petitioner was classified as 1-A by said board.

IX.

Thereafter, and in the month of September, 1946, your petitioner journeyed to Tijuana, Mexico, to visit with his relatives at said place, remained there for one day and returned to the United States at San Ysidro, California, the port of entry; that he presented his birth certificate, together with his Selective Service [4] registration certificate, to the officers in charge of said port of entry of said Immigration and Naturalization Service, and was thereupon denied permission to enter the United States as an American citizen; that he was advised at said time that he could not enter the United States, but if he desired he could return to said port of entry and make application for entry in the month of February, 1947; that your petitioner did return to said port of entry on February 19, 1947, at which time, as your petitioner is informed and believes and therefore alleges, a hearing was held before a Board of Special Inquiry of said Immigration and Naturalization Service; that at the termination of

said board hearing, your petitioner was denied permission to enter the United States and was excluded therefrom.

X.

That petitioner remained in the Republic of Mexico until on or about the 20th day of March, 1947, and did at said time enter the United States at San Ysidro, California, upon his claim of United States citizenship.

XI.

That your petitioner again registered for military service at Gardena, Los Angeles County, California, on the 9th day of September, 1948, before the local Selective Service Board at said place. That your petitioner was classified as 2-A by said board on February 25, 1949.

XII.

Thereafter, in the month of February, 1951, your petitioner journeyed to Tijuana, Mexico, to visit with relatives, and remained there a matter of approximately five days; that upon his return to the United States and upon the presentation of his birth certificate and Selective Service registration certificate, your petitioner was denied permission to enter the United States as a native-born constitutional citizen. That thereafter your petitioner returned to said port of entry at San Ysidro, California, and entered the United [5] States on or about September 21, 1951, and ever since said time has lived and resided in the United States and now resides at Gardena, Los Angeles County, California, within the district and jurisdiction of the above-

entitled Court. That your petitioner claims the right and privilege as a native-born constitutional citizen of the United States; that he has been denied such right by officers of the United States Immigration and Naturalization Service and by the respondents herein, who contend that petitioner is not a national of the United States; that as your petitioner is informed and believes and therefore alleges, said denial of his rights and privileges as a citizen of the United States is predicated upon the contention of the respondents herein that petitioner had departed and remained out of the United States for the purpose of evading and avoiding training and service in the military, air or naval forces of the United States during time of war or during a period proclaimed by the President to be a period of national emergency.

XIII.

Petitioner denies that he did depart from or did remain out of the United States for the purpose of evading or avoiding military service as aforesaid, and alleges the fact to be that he did not remain out of the United States for the purpose of evading or avoiding military service whatsoever. That he has at all times during time of war or during such period of national emergency been willing to serve and enter the military service of the Government of the United States, and that the determination by respondents that your petitioner departed from and remained out of the United States for the purpose of evading or avoiding military service is not true in fact, or predicated upon any lawful reason or

upon any substantial or probative evidence, but is in violation of petitioner's rights and privileges as a constitutional citizen of the United States and in further violation of the fifth and fourteenth amendments of the Constitution of the United States. [6]

XIV.

Petitioner alleges that his exclusion from the United States and the denial of his rights and privileges as a citizen of the United States occurred at the hearings conducted before the Immigration and Naturalization Service in 1947 and 1951, prior to the enactment of the provisions of Section 1503 of Title 8, U.S.C.A. Your petitioner alleges that his status as a national of the United States is not now in issue in any pending exclusion proceedings, and did not arise by or in connection with any exclusion proceedings or is an issue in any such exclusion proceedings since the enactment of said Section 1503 of Title 8, U.S.C.A., which statute became effective on December 26, 1952.

Wherefore, your petitioner prays:

(1) That it be declared, ordered and adjudged that your petitioner, Alfredo Ramirez Garcia, is a citizen of the United States; and,

(2) For such other and further relief as to the Court may seem just and proper.

/s/ DAVID C. MARCUS,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed May 3, 1955. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION AND
MOTION TO DISMISS

Notice of Motion to Dismiss

To the Petitioner Above Named and to David C.
Marcus, His Attorney:

You and Each of You Will Please Take Notice that the respondents above named, by and through the undersigned, will bring the following Motion to Dismiss on for hearing before the above-entitled Court, in the Courtroom of the Hon. William M. Byrne, United States District Judge, in the United States Post Office and Court House Building, 312 North Spring St., Los Angeles 12, California, on Monday, the 25th day of July, 1955, at 9:45 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: This 12th day of July, 1955.

LAUGHLIN E. WATERS,

United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,

Assistant U. S. Attorney, Attorneys for Respondents. [10]

MOTION TO DISMISS

Respondents above named, reserving all objections to the jurisdiction of this Court, by and

through the undersigned, move the Court to dismiss the within action pursuant to Rule 12(b) (1), (2), (6), Federal Rules of Civil Procedure, on the following grounds:

1. Lack of jurisdiction over the subject matter.
2. Lack of jurisdiction over the person.
3. Failure to state a claim upon which relief can be granted.

This Motion is based upon and will be presented upon the Petition for Declaratory Judgment and for Determination of United States Citizenship on file herein, the Affidavit of Albert Del Guercio, hereto annexed as Exhibit A, the certified record of the Immigration and Naturalization Service relating to Alfredo Ramirez Garcia hereto annexed as Exhibit B, these Motion papers and Memorandum of Points and Authorities in support thereof, together with all the records and files herein.

Dated: This 12th day of July, 1955.

LAUGHLIN E. WATERS,

United States Attorney;

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JAMES R. DOOLEY,

Assistant U. S. Attorney, Attorneys for Respondents. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF ALBERT DEL GUERCIO

United States of America,
Southern District of California—ss.

Albert Del Guercio, first being duly sworn, deposes and says:

I.

That he is the Officer in Charge, Immigration and Naturalization Service, Department of Justice, Los Angeles, California, and as such is custodian of the records of the United States Immigration and Naturalization Service in said Suboffice.

II.

That the record file No. A6 599 817 of the United States Immigration and Naturalization Service relating to Alfredo Ramirez-Garcia, the petitioner in Civil Action No. 18130-C, Southern District of California, Central Division, reflects that said petitioner was excluded from admission to the United States by a Board of Special Inquiry at San Ysidro, California, on February 19, 1947, after a full fair hearing on the ground that he was an immigrant alien who did not have in his possession a valid immigration visa as required by the Immigration Act of May 26, 1924, and not exempt from presenting such a document [17] by the said Act or regulations made thereunder; he having expatriated himself as a citizen of the United States under the provisions of Section 401(j) of the Nationality Act of 1940,

as amended, by remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

III.

That at the conclusion of the Board of Special Inquiry hearing the petitioner immediately entered an appeal to the Commissioner of the Immigration and Naturalization Service at Washington, D. C., from the excluding decision of the Board of Special Inquiry.

IV.

That on March 25, 1947, the Commissioner of the Immigration and Naturalization Service affirmed the excluding decision of the Board of Special Inquiry and referred the case to the Board of Immigration Appeals for consideration.

V.

That on March 31, 1947, the Commissioner's order of March 25, 1947, was affirmed by the Board of Immigration Appeals.

VI.

That on September 19, 1951, the petitioner applied for admission to the United States at the port of entry at San Ysidro, California, and was thereupon advised by an Immigration officer to return the following day, September 20, 1951, for further

proceedings pursuant to his application for admission.

VII.

That the petitioner failed to return to the port of entry at San Ysidro, California, on September 20, 1951, or thereafter, for further proceedings pursuant to his application for admission.

VIII.

That the record file of the United States Immigration and Naturalization Service No. A6 599 817, relating to the petitioner, does not disclose any further proceedings or any record of lawful entry into the United States of the said petitioner subsequent to his exclusion by the Board of Special Inquiry at San Ysidro, California, on February 19, 1947.

/s/ ALBERT DEL GUERCIO.

Subscribed and sworn to before me this 23rd day of June, 1955.

JOHN A. CHILDRESS,

Clerk, U. S. District Court;

By /s/ SIDNEY H. GREEN,

Deputy Clerk.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 12, 1955. [18]

United States District Court, Southern District of
California, Central Division

No. 18130-WB Civil

ALFREDO RAMIREZ GARCIA,

Petitioner,

vs.

HERBERT BROWNELL, Attorney General of the
United States, and ALBERT DEL GUERCIO,
Officer in Charge, Immigration and Naturaliza-
tion Service at Los Angeles, California,

Respondents.

ORDER OF DISMISSAL

The above-entitled matter came on regularly for hearing on respondents' Motion to Dismiss on July 25, 1955, in the above-entitled Court, before the Hon. William M. Byrne, Judge Presiding, the petitioner being represented by his attorney, David C. Marcus, and the respondents being represented by their attorneys, Laughlin E. Waters, United States Attorney; Max F. Deutz and James R. Dooley, Assistants U. S. Attorney, by James R. Dooley; and the Court having considered respondents' Motion, Memoranda of counsel in regard thereto, together with all the records and files herein; and the Court having taken said Motion under submission, and being fully advised in the premises:

Now, Therefore, It Is Hereby Ordered:

1. That the Petition for Declaratory Judgment and for Determination of United States Citizenship

on file herein be, [40] and the same is hereby dismissed for failure to state a claim upon which relief can be granted [Rule 12(b)(6), Federal Rules of Civil Procedure].

2. That respondents have costs against the petitioner, taxed at \$20.00.

Dated: This 10th day of August, 1955.

/s/ W. M. BYRNE,

Judge, U. S. District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 10, 1955.

Judgment docketed and entered August 11, [41] 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Alfredo Ramirez Garcia, petitioner herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal entered in the above-entitled proceedings on August 11, 1955, and from the whole thereof.

Dated this 17th day of August, 1955.

/s/ DAVID C. MARCUS,

Attorney for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 23, 1955. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD AND DOCKET APPEAL

It appearing that the Clerk of the above-entitled Court does not have sufficient time to prepare the record on appeal in the above-entitled matter within the period allowed, and good cause appearing therefor,

It Is Hereby Ordered that the above-named petitioner may have to and including October 14, 1955, to file the record and docket the appeal in the United States Court of Appeals for the Ninth Circuit.

Dated this 29th day of September, 1955.

/s/ W. M. BYRNE,

United States District Judge.

[Endorsed]: Filed September 28, 1955. [49]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 49, inclusive, contain the original

Petition for Declaratory Judgment;

Motion and Notice of Motion to Dismiss together with Memo of Points and Authorities in Support thereof;

Order of Dismissal;

Notice of Appeal Designation of Record on Appeal;

Counter Designation of Record on Appeal;
Order Extending Time to File Record on
Appeal

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further Certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 14th Day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14905. United States Court of Appeals for the Ninth Circuit. Alfred Ramirez Garcia, Appellant, vs. Herbert Brownell, Attorney General of the United States, and Albert Del Guercio, Officer in Charge Immigration & Naturalization Service at Los Angeles, California, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 18, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14905

ALFREDO RAMIREZ GARCIA,

Petitioner-Appellant,

vs.

HERBERT BROWNELL, Attorney General of the
United States, et al.,

Respondents-Appellees.

STIPULATION

It Is Hereby Stipulated by and between respective counsel hereto that the certified record of the Immigration and Naturalization Service relating to Alfredo Ramirez Garcia, attached as Exhibit "B" to the Motion to Dismiss, need not be printed but may be used by the above-entitled Court in its original form.

Dated this 31st day of October, 1955.

/s/ DAVID C. MARCUS,
Attorney for Appellant.

LAUGHLIN E. WATERS,
U. S. Attorney;

By /s/ JAMES R. DOOLEY,
Attorneys for Appellees.

[Title of Court of Appeals and Cause.]

ORDER

Upon reading and filing the foregoing stipulation, and good cause appearing therefor:

It Is Ordered that the certified record of the Immigration and Naturalization Service relating to Alfredo Ramirez Garcia, attached as Exhibit "B" to the Motion to Dismiss, need not be printed, but may be used by the above-entitled Court in its original form.

Dated this....day of November, 1955.

.....,

Judge.

[Endorsed]: Filed November 3, 1955.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant designates the following statement of points on appeal.

1. That the Court erred in dismissing the proceedings.

2. That the Court erred in denying petitioner the right to a judicial review of the proceedings before the Department of Justice, Immigration and Naturalization Service.

3. That the Court erred in denying petitioner a trial de novo on his claim of United States citizenship.

4. That section 360(a) of Public Law 414, wherein a native-born citizen of the United States is denied a hearing upon his claim of United States citizenship because his status as a citizen may have arisen out of or be an issue in exclusion proceedings, is unconstitutional.

5. That the Court erred in granting the motion to dismiss and in holding section 360(a) of Public Law 414 constitutional.

6. That petitioner was denied due process of law and the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Dated this 29th day of November, 1955.

/s/ DAVID C. MARCUS,
Attorney for Appellant.

[Endorsed]: Filed November 29, 1955.

No. 14,905

United States Court of Appeals
For the Ninth Circuit

ALFREDO RAMIREZ GARCIA,

Appellant,

VS.

HERBERT BROWNELL, Attorney General
of the United States, and ALBERT
DEL GUERCIO, Officer in Charge, Im-
migration and Naturalization Serv-
ice at Los Angeles, California,

Appellees.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S OPENING BRIEF.

DAVID C. MARCUS,

215 West Fifth Street, Los Angeles, California.

Attorney for Appellant.

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United States Court of Appeals For the Ninth Circuit

ALFREDO RAMIREZ GARCIA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General
of the United States, and ALBERT
DEL GUERCIO, Officer in Charge, Im-
migration and Naturalization Serv-
ice at Los Angeles, California,

Appellees.

Appeal from the United States District Court for the
Southern District of California,
Central Division.

APPELLANT'S OPENING BRIEF.

PLEADINGS.

On May 3, 1955, Alfredo Ramirez Garcia filed his "Petition for Declaratory Judgment and for Determination of United States Citizenship", alleging and contending that he is a constitutional citizen of the United States under the Fourteenth Amendment of the Constitution of the United States, born at Gardena, California, on the 27th day of March, 1926 (Tr. 4). He further alleged that he sought admission into

the United States in the year 1943 at the port of entry at San Ysidro, California, claiming his United States citizenship, but was denied admission for the reason that he was not in possession of or presented an official birth certificate, but only presented his baptismal certificate showing such birth (Tr. 4). He further alleged numerous demands to effect admission into the United States, but was denied such right of entry; that in 1946, when he finally secured a copy of his birth certificate, he presented said birth certificate on the 1st day of July, 1946, to officers of the Immigration Service and was permitted to enter the United States as a native born citizen (Tr. 5-6). He further alleged that immediately upon his entrance he registered for military service under the Selective Service and Training Act (Tr. 6).

In September, 1946 petitioner made a short trip to Tijuana, Mexico, remained one day and returned to the United States at San Ysidro, a port of entry, presented his birth certificate together with his Selective Service registration certificate, to officers in charge of said port, and was thereupon denied permission to enter the United States as an American citizen; that he was advised that "he could return to said port of entry and make application for entry in the month of February, 1947"; that he did return to said port on February 19, 1947. He alleged that a hearing was held before a Board of Special Inquiry of the Immigration Service, and at the conclusion of said hearing he was denied permission to enter the United States and was excluded therefrom (Tr. 6-7).

Petitioner remained in the Republic of Mexico until the 20th of March, 1947, again presented himself to the officers of the Immigration Service at San Ysidro, and was permitted to enter upon his claim of United States citizenship. Petitioner remained in the United States until February of 1951, and at that time journeyed to Tijuana to visit with relatives, and remained approximately 5 days. Upon his return he was again denied permission to enter as a native born constitutional citizen. Thereafter he returned to said port of entry at San Ysidro and entered the United States on or about September 21, 1951, and since that time has lived and resided in the United States and now resides at Gardena, California (Tr. 7).

Petitioner further alleged that his exclusion from the United States and the denial of his rights and privileges as a citizen occurred at hearings conducted before the Immigration Service in 1947 and 1951, prior to the enactment of section 1503, Title 8, U.S.C.A. He further alleged that his status as a national of the United States "is not now in issue in any pending exclusion proceedings and did not arise by or in connection with any exclusion proceedings or is an issue in any such exclusion proceedings since the enactment of said Section 1503 of Title 8, U.S.C.A., which statute became effective on December 26, 1952" (Tr. 8-9). He prayed for a declaration of citizenship and for such other relief as to the court may seem proper.

To his petition the respondents moved to dismiss under Rule 12(b) (1), (2), (6), Federal Rules of

Civil Procedure, on the grounds (1) lack of jurisdiction over the subject-matter; (2) lack of jurisdiction over the person; and (3) failure to state a claim upon which relief can be granted (Tr. 10-11).

In support of said motion respondents filed an affidavit of Albert Del Guercio, who alleged that he was the officer in charge of the Immigration and Naturalization Service at Los Angeles; that "petitioner was excluded from admission to the United States by a Board of Special Inquiry at San Ysidro, on February 19, 1947, after a full fair hearing on the ground that he was an immigrant alien who did not have in his possession a valid immigration visa as required by the Immigration Act of May 26, 1924 * * * *he having expatriated himself* as a citizen of the United States under the provisions of Section 401(j) of the Nationality Act of 1940, as amended, by remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States" (Tr. 12-13). It further appears from said affidavit that an appeal was perfected to the Commissioner of Immigration, who on March 25, 1947 affirmed the excluding decision of the Board, and that on March 31, 1947 the Commissioner's order was affirmed by the Board of Immigration Appeals (Tr. 13).

Upon the record thus presented to the District Court the Honorable W. M. Byrne, Judge, ordered that the petition for declaratory judgment and for

determination of United States citizenship be dismissed for failure to state a claim upon which relief can be granted (Rule 12 (b)(6), Federal Rules of Civil Procedure) (Tr. 15-16). An appeal was thereupon perfected to this Honorable Court.

QUESTIONS PRESENTED.

(1) Whether the 1952 Act (66 Stat. 163) deprives petitioners of their right under the 1940 Act to have the issue of their citizenship, which had arisen in exclusion proceedings, decided in actions for declaratory judgment.

(2) Is that portion of section 360(a) which deprives a native born citizen of the United States of his right to a judicial determination of his citizenship, where such person's status as a national of the United States (a) arose by reason of or in connection with any exclusion proceedings under the provisions of this or any other Act, or (b) is in issue in any such exclusion proceedings, constitutional?

ARGUMENT.

I.

The first question presented for determination by this Court has been decided adversely to the Government's position in the very recent case of *Wong Kay Suey v. Brownell*, 227 Fed. (2d) 41, United States Court of Appeals, District of Columbia Circuit.

The Court, speaking through Justice Edgerton, determined that the savings clause of the 1952 Act, Section 405(a) was broad enough to cover plaintiff's rights under the 1940 Act "to sue for declaratory judgment". The language follows:

"We take Sec. 360(a) to mean that no right to have the issue of citizenship determined in a suit for a declaratory judgment shall arise in the future, if the issue of citizenship arose in connection with exclusion proceedings. In view of the savings clause, we do not take Sec. 360(a) to mean that an existing right to sue for a declaratory judgment shall be cut off.

Our view of the case makes it unnecessary to decide whether the plaintiffs are 'within the United States' in the sense in which Sec. 360(a) uses that term. Unless they are, the section does not apply to them at all. Even if they are, it does not bar their present suits.

We think the District Court erred in holding that it lacked jurisdiction."

"The general language in this savings clause operates 'unless otherwise specifically provided' in the Act. This exception does not cover this case. Nowhere in the 1952 Act is it 'specifically provided' that if the issue of citizenship has arisen in an exclusion proceeding, a right already accrued under the 1940 Act, to have the issue decided in an action for a declaratory judgment, shall be cut off."

In view of the fact that the decision is directly in point on this issue presented by the instant case, we

respectfully direct this Court's attention to the entire reasoning of the opinion.

Section 903 of Title 8, U.S.C.A., in full force and effect on the date of petitioner's exclusion from the United States, provided in part as follows:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States."

The denial of petitioner's rights as a citizen of the United States occurred, as alleged in the petition, in the years 1947 and 1951. Section 360(a) was not effective at that time and did not become effective until December 26, 1952. The 1952 Immigration and Nationality Act did not deprive petitioner under this section of his right under the 1940 Nationality Act to have the issue of his citizenship, *which had arisen in exclusion proceedings under the 1940 Act*, decided in an action for declaratory judgment (*Suey v. Brownell, supra; Shung v. Brownell*, 227 Fed. (2d) 40).

II.

That portion of section 360(a) which deprives a citizen of the United States of his right to a judicial determination of his citizenship "if the issue of such person's status as a national of the United States (a) arose by reason of or in connection with any exclusion proceedings under the provisions of this or any other act, or (b) is in issue in any such exclusion proceedings" is unconstitutional.

Due process guaranteed by the fifth amendment of the Constitution of the United States requires that a substantial constitutional claim of citizenship be afforded a judicial trial, and the denial of such right of judicial determination of citizenship cannot constitutionally be applied to one who is a resident of the United States.

Exclusion orders have no finality when such orders affect the constitutional guarantee of the fourteenth amendment, insofar as such guarantees are applicable to the rights created by citizenship at birth under such amendment, and such denial of citizenship affects one who is residing in the United States.

The practical effect of the operation of section 360(a), *supra*, is to leave the final determination of a constitutional guarantee of citizenship to a purely ministerial or administrative board or official. If a native born citizen leaves the United States, and upon his return an immigration official affords a perfunctory hearing and determines that he is not a

citizen, that decision is final and cannot be reviewed on a trial *de novo* by the courts. This cannot be the law of the land.

Immigration officials cannot constitutionally exclude a native born citizen of the United States. When such act does occur, what remedy or relief may such person so excluded seek in the courts if section 360(a), *supra*, is constitutional? Clearly, a native born citizen cannot be either excluded or deported. The Immigration and Naturalization Service has no jurisdiction, either to exclude or deport, any person unless and in fact he is an alien. The determination of this jurisdictional fact of course must be determined by the Immigration Service in the first instance in exclusion proceedings, where one who claims to be a citizen seeks to enter as a native born citizen. When a person makes a claim of citizenship, supported by evidence of birth in the United States, and is thereupon excluded, he is constitutionally entitled to a judicial determination *de novo* of his claim of citizenship.

If the courts are to literally follow the interpretation of section 360(a), that no person can maintain an action as a citizen of the United States, where his rights and privileges as such citizen are denied by any department, or agency, or official thereof, on the ground that he is not a national of the United States and where the status of said citizenship is in issue in any exclusion proceedings, or arose by reason of or in connection with any ex-

clusion proceedings, the same would be a direct violation of Article III and the 14th amendment of the Constitution of the United States.

The denial of such judicial determination of citizenship would, indeed, be disturbing and shocking. Congress has seen fit to place the final determination of citizenship, even though a person may be a resident of the United States, if his status arose by virtue of any exclusion proceedings, or is in issue in any exclusion proceedings, in a purely administrative or ministerial officer.

The right of citizenship is the most highly prized possession to be left to the whim of a purely executive officer, without hope or chance of a judicial determination. This surely is an abridgement upon the jurisdiction and powers of the Courts of the United States and should never be sanctioned or approved.

The following cases support petitioner's position:

In re Ng Fung Ho v. White, 259 U.S. 276, 42 Sup. Ct. 492;

Carmichael v. Delaney, 170 Fed. (2d) 239;

Lee Fong Fook v. Wixon, 170 Fed. (2d) 245;

Bilokumsky v. Tod, 263 U.S. 149, 152;

Kessler v. Strecker, 107 U.S. 22, 34, 59 Sup. Ct. 64;

Bridges v. Wixon, 326 U.S. 135;

Fat v. White, 253 U.S. 454.

In depriving a person of his American citizenship, the courts have uniformly held that the Government must be held to a strict degree of proof and to prove

such loss by clear, unequivocal and convincing evidence and not by a preponderance.

Gonzales v. Landon, U.S. Supreme Court, No. 111, October Term, 1955, Dec. 12, 1955.

CONCLUSION.

Appellant prays that the judgment of the District Court be reversed.

Dated, Los Angeles, California,
February 15, 1956.

DAVID C. MARCUS,
Attorney for Appellant.

No. 14905

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFREDO RAMIREZ GARCIA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United States, and ALBERT DEL GUERCIO, Officer in Charge Immigration & Naturalization Service at Los Angeles, California,

Appellees.

BRIEF OF APPELLEES.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

JAMES R. DOOLEY,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellees.

FILED

APR 11 1956

PAUL P. O'BRIEN, CLERK

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No. 14905

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFREDO RAMIREZ GARCIA,

Appellant,

vs.

HERBERT BROWNELL, Attorney General of the United States, and ALBERT DEL GUERCIO, Officer in Charge Immigration & Naturalization Service at Los Angeles, California,

Appellees.

BRIEF OF APPELLEES.

Jurisdiction of the Court.

Appellant brought action in the Court below seeking a judgment declaring him to be a citizen of the United States [R. 3-10].¹ Jurisdiction was invoked pursuant to Section 360(a) of Public Law 414 (Immigration and Nationality Act), Section 2201, Title 28, U. S. C. A., and Article III and the Fourteenth Amendment of the Constitution of the United States [R. 3]. It is the position of appellees that the District Court lacked jurisdiction over the subject matter, that is, the power to determine

¹"R" refers to the printed Transcript of Record. "Br." refers to Appellant's Opening Brief.

whether appellant is a citizen of the United States; although it had authority to determine whether such jurisdiction did exist [*Chicot County Dist. v. Bank*, 308 U. S. 371, 376-377 (1940)]. The District Court assumed jurisdiction for the evident purpose of determining whether, from the allegations of appellant's Petition, and from the record as a whole [R. 15], its jurisdiction existed. Having made such determination adversely to appellant, his Petition was dismissed for failure to state a claim upon which relief can be granted [R. 16].²

Since the order of the Court below was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C., Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter [*United States v. Corrick*, 298 U. S. 435, 440 (1936)].

Statement of the Case.

On May 3, 1955, appellant filed in the court below a Petition for Declaratory Judgment and¹ for Determination of United States Citizenship [R. 3-9]. He claimed jurisdiction under Section 360(a) of Public Law 414 (Immigration and Nationality Act of 1952); Section

²The jurisdictional concept adopted by the court below is indicated by its language in *Aguilera-Flores v. Landon*, 125 Fed. Supp. 55 (S. D. Cal., 1954) at page 57: ". . . Assuming that the defendant is correct in his contention that a deportation order cannot be challenged in the courts except in a habeas corpus proceeding, that determination must be made after and not before the court has assumed jurisdiction over the controversy. If the court determines that deportation orders remain immune to direct attack, then the allegations in the complaint do not state a claim upon which relief can be granted, and the dismissal would be on that ground, not for want of jurisdiction."

2201, Title 28, U. S. C. A.; and Article III and the Fourteenth Amendment to the Constitution of the United States [R. 3].

Appellees moved for dismissal pursuant to Rule 12(b) (1), (2), and (6), Federal Rules of Civil Procedure, for lack of jurisdiction over the subject matter, for lack of jurisdiction over the person, and for failure to state a claim upon which relief can be granted [R. 10-11]. Attached to this motion as exhibits were an affidavit of Albert Del Geurcio, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California [R. 12-14], and a certified record of the Immigration and Naturalization Service relating to appellant [Ex. B].³ The allegations of appellant's petition and the exhibits attached to appellees' motion disclose that appellant was accorded a hearing in exclusion proceedings by a Board of Special Inquiry at San Ysidro, California, on February 19, 1947; that said Board determined that appellant had expatriated himself as a citizen of the United States under the provisions of Section 401(j) of the Nationality Act of 1940, as amended; and that on February 19, 1947, appellant was excluded from admission to the United States as an alien [R. 6-7, 8, 12-13; Ex. B]. On or about September 21, 1951, appellant managed to reenter the United States and has resided here ever since [R. 7].

Upon the record thus presented, the District Court ordered that appellant's Petition for Declaratory Judgment and for Determination of United States citizenship be dismissed for failure to state a claim upon which relief can be granted [R. 15-16].

³A stipulation was approved by this Court that Exhibit "B" attached to Motion to Dismiss might be considered in its original form [R. 19-20].

Questions Presented.

1. Did the District Court have jurisdiction to declare appellant a citizen of the United States under the statutory or constitutional provisions invoked in his petition?

2. Did the District Court have jurisdiction to declare appellant a citizen of the United States under Section 503 of the Nationality Act of 1940?

3. Is that portion of Section 360(a) constitutional which precludes an action thereunder where the issue of one's status as a national of the United States (a) arose by reason of or in connection with any exclusion proceedings under the provisions of this or any other Act, or (b) is in issue in any such exclusion proceedings?

Statutes Involved.

Section 360(a) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 8 U. S. C. A., Section 1503(a), provides:

“Sec. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district

court of the United States for the district in which such person resides or claims a residence, and, jurisdiction over such officials in such cases is hereby conferred upon those courts.”

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U. S. C. A., Section 903, provides in pertinent part:

“Sec. 503. If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *.”

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part:

“Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, [*sic*] conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *.”

ARGUMENT.

I.

Summary.

The District Court was without jurisdiction to declare appellant a citizen of the United States under any of the statutory or constitutional provisions set forth in his petition. Jurisdiction could not be based upon Section 360(a) of the Immigration and Nationality Act of 1952, because the issue of appellant's status as a national of the United States arose by reason of and in connection with exclusion proceedings. Section 2201, 28 U. S. C. A., did not confer jurisdiction, since this statute, commonly referred to as the Federal Declaratory Judgment Act, does not provide an independent basis for federal jurisdiction. Article III and the Fourteenth Amendment of the Constitution do not provide a jurisdictional foundation, because only the Supreme Court derives jurisdiction directly from the Constitution.

Nor did the court below acquire jurisdiction under Section 503 of the Nationality Act of 1940. *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C. A. Dist., Col., 1955), cert. den. 24 L. W. 3225, which holds that a right to institute an action under Section 503 is preserved by the savings clause of the 1952 Act, is unsound for the following reasons: (1) the savings clause did not preserve mere procedural remedies; (2) the savings clause should not be applied because the 1952 Act specifically provides otherwise; (3) the legislative history of the 1952 Act suggests that Congress intended to cut off the right to institute an action under Section 503.

Section 360(a) does not deny appellant due process. It does not deprive him of his "day in court," but merely relegates him to the judicial remedies, such as habeas

corpus, which existed before the Nationality Act of 1940. The cases upon which appellant relies are distinguishable in that (1) they involved habeas corpus proceedings of which the court unquestionably acquired jurisdiction, and (2) the person claiming citizenship was resisting either deportation or exclusion, which is not true in the case at bar.

II.

The District Court Did Not Have Jurisdiction to Declare Appellant a Citizen of the United States Under Any of the Statutory or Constitutional Provisions Invoked in His Petition.

Except for his challenge to the constitutionality of a portion of Section 360(a) of the Immigration and Nationality Act of 1952 (Br. 8-11), Appellant, in his Opening Brief, apparently abandons his claim of jurisdiction under the statutory and constitutional provisions set forth in his petition [R. 3]. The reasons for this implied concession will be briefly discussed.

The District Court did not have jurisdiction under Section 360(a), since the issue of appellant's status as a national of the United States arose by reason of and in connection with exclusion proceedings [R. 12-13; Ex. B; *Nevarez v. Brownell*, 218 F. 2d 575 (C. A. 5, 1955); *Matsuo v. Dulles*, 133 Fed. Supp. 711, 715 (S. D., Calif., 1955); *Beltran v. Brownell*, 121 Fed. Supp. 835 (S. D., Calif., 1954); *Gonzalez-Gomez v. Brownell*, 114 Fed. Supp. 660 (S. D. Calif., 1953); *Vasquez v. Brownell*, 113 Fed. Supp. 722 (W. D., Tex., 1953); *Ng Gwong Dung v. Brownell*, 112 Fed. Supp. 673, 674 (S. D., N. Y., 1953)].

Section 2201, 28 U. S. C. A. did not confer jurisdiction upon the court below. This section, commonly referred to as the Federal Declaratory Judgment Act, does not

provide an independent basis for federal jurisdiction, but merely enlarges the range of remedies available in a federal court, where its jurisdiction is otherwise established. [*Skelly Oil Co. v. Phillips Co.*, 339 U. S. 667, 671 (1950); *Van Buskirk v. Wilkinson*, 216 F. 2d 735, 737 (C. A. 9, 1954); *Southern Pacific Co. v. McAdoo*, 82 F. 2d 121 (C. A. 9, 1956).]

Nor did the District Court acquire jurisdiction under Article III or the Fourteenth Amendment of the Constitution of the United States. Only the Supreme Court of the United States derives jurisdiction directly from the Constitution. Other federal courts have only such jurisdiction as Congress has prescribed [*Lockerty v. Phillips*, 319 U. S. 182, 187 (1943); *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234 (1922); *People v. Bruce*, 129 F. 2d 421, 423 (C. C. A. 9, 1942), cert. den. 317 U. S. 710].

III.

The District Court Did Not Have Jurisdiction to Declare Appellant a Citizen of the United States Under Section 503 of the Nationality Act of 1940.

For the first time in his Opening Brief, appellant seeks to rely upon Section 503 of the Nationality Act of 1940 as a jurisdictional basis for his petition. He cites in support of his position the recent case of *Wong Kay Suey v. Brownell*, 227 F. 2d 41 (C. A. Dist. Col., 1955), cert. den. 24 L. W. 3225⁴.

⁴No inference, of course, can be drawn from the denial by the Supreme Court of certiorari (*Brown v. Allen*, 344 U. S. 443, 489-497 (1953)). This is particularly true here because in the District of Columbia, where the *Suey* case arose, it was possible to institute an action for declaration of nationality even before a specific statute was enacted for that purpose (*Perkins v. Elg*, 307 U. S. 325 (1939); *Matsuo v. Dulles*, 133 Fed. Supp. 711, 713 (S. D. Cal., 1955)).

In *Suey* the Court of Appeals for the District of Columbia held that where one claiming citizenship was excluded from admission to the United States prior to the repeal of Section 503 of the Nationality Act of 1940,⁵ he acquired a right to have his citizenship judicially determined under the latter statute; and that this right was preserved by the savings clause contained in the Immigration and Nationality Act of 1952,⁶ so as to enable him to institute an action under Section 503 for declaration of nationality after the effective date of the 1952 Act. Appellees submit that the *Suey* decision should not be accepted for the reasons which follow.⁷

(a) Procedural Remedies Were Not Preserved by the Savings Clause.

Even if it be assumed that by reason of his exclusion during 1947 appellant acquired a "right" to institute an action under Section 503, such right was solely procedural in nature, and as such, was not preserved by the savings

⁵Section 503 was repealed by Section 403(a) (42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act, 66 Stat. 281).

⁶Section 405(a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U. S. C. A., note following Section 1101.

⁷An acceptance of the *Suey* decision could have far-reaching implications. The State Department has advised that during the five years from 1948 to 1952, 37,518 certificates of loss of nationality were approved pursuant to Section 501 of the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. A., Section 901. Under the doctrine enunciated in *Suey*, the door is now open to all those citizenship claimants (not resident in this country) who have not previously done so to institute suits for declaratory judgment under former Section 503. In addition, persons abroad claiming nationality as the foreign born children of American parents, who were denied travel documents before December 24, 1952 could institute such actions. While the exact number of the latter type of cases is not known, it is believed to be considerable.

clause of the 1952 Act. Of course, actions actually instituted before December 24, 1952, when Section 503 was repealed, do come within the savings clause.⁸ However, since appellant did not file suit before the latter date, the savings clause did not authorize him to do so on May 3, 1955, when the present action was commenced [R. 9]. General phrases contained in the savings clause, such as "right in process of acquisition" and "liability" refer to substantive rights and liabilities, and do not preserve a right to institute an action under Section 503, which was merely a procedural remedy.

The *Suey* decision ignores entirely the distinction between the effect of a general savings clause upon statutes, such as Section 503, which create mere procedural "rights" or remedies, and its effect upon statutes which create substantive rights and liabilities. The latter type of statute is preserved by a general savings clause, while the former is not. [*Bridges v. United States*, 346 U. S. 209, 224-227 (1953); *De La Rama S.S. Co. v. United States*, 344 U. S. 386 (1952); *Hallowell v. Commons*, 239 U. S. 506 (1916); *Aure v. United States*, 225 F. 2d 88, 90 (C. A. 9, 1955); *United States v. Obermeir*, 186 F. 2d 243, 250-256 (C. A. 2, 1952), cert. den. 340 U. S. 951; *Matsuo v. Dulles*, 121 Fed. Supp. 711 (S. D., Calif., 1954).]

In *Aure v. United States*, *supra*, this Court was confronted with the issue of whether a right to naturalization

⁸For this reason the decisions of this Court in *Fujii v. Dulles*, 224 F. 2d 906, and *Suda v. Dulles*, 224 F. 2d 908, are not in point on the issue here involved. There, the actions had been commenced before the effective date of the 1952 Act, the issue being whether there had been a sufficient denial of a right of citizenship to warrant the institution of such action before December 24, 1952.

existing under the 1940 Act was preserved by the savings clause of the 1952 Act, so as to enable such right to be exercised after the effective date of the latter statute. Following a careful analysis of the recent decision of the Supreme Court in *United States v. Menasche*, 348 U. S. 528 (1955), this Court, speaking through Judge Byrne, observed (p. 90):

“ . . . The real test is whether the ‘right’ which the alien seeks to have preserved by the savings clause is a substantive right, and in this regard we are mindful of the distinction between substantive rights and procedural remedies. . . .” (Emphasis added.)

In *Matsuo v. Dulles*, *supra*, Judge Byrne had occasion to apply this test to the precise question here involved. After an exhaustive review of the authorities, he concluded that Section 503 created merely a procedural remedy which was not preserved by Section 405(a).

To the same effect:

Ng Gwong Dung v. Brownell, 112 Fed. Supp. 673, 674 (S. D. N. Y., 1953);

Avina v. Brownell, 112 Fed. Supp. 15, 19-20 (S. D. Texas, 1952).

Section 503 should be distinguished from those statutes in which substantive rights are fused with procedural remedies. Thus, in *De La Rama S.S. Co. v. United States*, *supra*, where a war risk policy had been issued under the War Risk Insurance Act of 1940, as amended, which statute authorized suit on the policy in a Federal District Court; the substantive right to recover on the policy and the forum in which suit was to be brought were deemed “fused components of the expression of a policy.” In holding that a general savings clause preserved

a right to maintain suit in the District Court, however, the Supreme Court was careful to recognize the following distinction (p. 390):

“The Government rightly points to the difference between the repeal of *statutes solely jurisdictional in their scope* and the repeal of *statutes which create rights and also prescribe how the rights are to be vindicated*. In the latter statutes, ‘substantive’ and ‘procedural’ are not disparate categories; they are fused components of the expression of a policy. When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. *Ex parte McCardle*, 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hallowell v. Commons*, 239 U. S. 506, and *Bruner v. United States*, 343 U. S. 112. *If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.* * * *” (Emphasis added.)

Section 503 of the Nationality Act of 1940 was “solely jurisdictional” in its scope. It did not provide a means of acquiring nationality,⁹ but a forum for determining its existence. A judgment under Section 503 does not confer nationality, nor does it take nationality away, but merely adjudicates an already existing status [See, *Acheson v. Fujiko Furusho*, 212 F. 2d 284, 292, 296 (C. A. 9, 1954)]. Appellant lost his nationality, if at all, at the time of his expatriating act [*United States ex rel. Lapidés v. Watkins*, 165 F. 2d 1017 (C. A. 2, 1948)].

⁹*United States v. Menasche*, 348 U. S. 528 (1955) and *Bertoldi v. McGrath*, 178 F. 2d 977 (C. A. Dist. Col., 1949) afford examples of a general savings clause being applied to preserve a substantive right of citizenship in the process of being acquired under prior law.

(b) The Savings Clause Should Not Be Applied Because the 1952 Act Specifically Provides Otherwise.

Moreover, the savings clause itself provides that it shall apply “unless otherwise specifically provided.” See *Shomberg v. United States*, 348 U. S. 540. Section 360 (a) is a section otherwise specifically providing for retro-active effect; it states that a declaratory judgment action shall not lie if the issue of citizenship” (1) *arose* [in an] exclusion proceeding under the provisions of *this or any other act*, or (2) is in issue *in any such* exclusion proceeding.” (Emphasis added.) The use of the past tense “arose” in a statute which otherwise uses the present tense is itself a strong indication that Congress intended past exclusion proceedings to be governed by the present procedure. And this conclusion is fortified by the phrase “of this or any other act.” The 1952 Act, which is a comprehensive codification of the laws on immigration and nationality, is the statute under which all exclusions after December 24, 1952, would be enforced. “Any other act,” referred to in Section 360(a), must relate to past exclusions under past acts.

The *Suey* decision recognized that the language of Section 360(a) “might perhaps seem to bring the case within the words ‘otherwise specifically provided’ ” to take that section out of the general savings clause (227 F. 2d at p. 43), but thought the language did not have the same degree of specificity as other sections which have been construed to render the savings clause inoperative. In the 1952 Act, however, Congress did not use any one set formula to show that the savings clause was not to apply. The language of Section 241(d), referred to in

Suey as a specific section,¹⁰ is quite different from the language of Section 313(a), also thought by the court below to have the degree of specificity rendering the general savings clause inapplicable.¹¹ For the reasons set forth immediately above, we think that the language of Section 360(a), although employing a different set of words, clearly conveys the idea that the procedure in Section 360(a) is to apply to a past exclusion which "arose" under an act "other" than the 1952 Act, *i. e.*, under prior acts. Particularly is this true since, as we have already pointed out, an uninstituted action would not fall within the normal meaning of the terms used in Section 405(a), and also because a change in remedy is generally construed as being immediately applicable. (See *Ex parte Collett*, 337 U. S. 55, 71; *Bruner v. United States*, 343 U. S. 112, 116-117.)

(c) The Legislative History of the 1952 Act Supports Appellees' Position.

The legislative history of the 1952 Act suggests that Congress intended to cut off the right to bring a declaratory judgment action under former Section 503. One

¹⁰Section 241(d), 66 Stat. at 208, 8 U. S. C. 1251(d), held to render the savings clause inapplicable to save a prior status of non-deportability (*Gagliano v. Nabers*, 222 F. 2d 958 (C. A. 5), certiorari denied, 350 U. S. 902; see also *Marcello v. Bond*, 349 U. S. 302), reads in pertinent part that the "provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding * * * that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act."

¹¹That section, 66 Stat. at 240, 8 U. S. C. 1424(a), relating to naturalization, like the section construed in *Shomberg v. United States*, 348 U. S. 540, begins, "Notwithstanding the provisions of Section 405(b)." It does not refer to the general savings clause in Section 405(a).

of the problems which had arisen under Section 503 had been the number of cases where persons had employed this statute solely for the purpose of gaining entry into the United States. In the broad study of the working of the existing immigration and nationality laws represented by Senate Report 1515, 81st Cong., 2d Sess., the following observation is made (p. 777):

“In spite of the definite restrictions on the use and application of section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed.”

The hearings on the McCarran-Walter bill (which became the 1952 Act) indicate concern with “the fraud and the derivative citizenship cases,” and with the fact that aliens not entitled to admission were gaining physical entry into the United States and disappearing into the general population. Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess. on S. 716, H. R. 2379, and H. R. 2816, p. 443; see also pp. 108-109. The enactment of present Section 360, instead of the alternative suggestion that the pattern of former Section 503 be continued,¹² thus represents a clear Congressional decision to curtail the scope of declaratory judgment review. Since Congress used no words showing a purpose to have the former remedy apply, but, on the contrary, employed phraseology which, as the *Suey* decision itself recognized, can reasonably be read to mean

¹²The revisions of procedure originated in the Senate bill. The House bill continued the provisions of former Section 503. See S. Rep. 1137, 82nd Cong., 2d Sess., p. 50; H. Rep. 1365, 82nd Cong., 2d Sess., p. 87. The Senate formulation ultimately prevailed.

that the procedure established by the new Section 360(a) should be applicable to all exclusions, past or present, where judicial review had not been sought by December 24, 1952, the holding in *Sney* that the remedy of former Section 503 survives the repeal of that provision is unsound.

IV.

Section 360(a) of the Immigration and Nationality Act of 1952 Is Constitutional.

Appellant urges as unconstitutional that portion of Section 360(a) which precludes an action thereunder "if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding." (Br. 8.) He contends that this provision denies him due process because it leaves "the final determination of a constitutional guarantee of citizenship to a purely ministerial or administrative board or official." (Br. 8.)

Appellant's position is untenable. Section 360(a) does not deprive appellant of citizenship without the sanction afforded by judicial proceedings, but merely relegates him to those judicial remedies, such as habeas corpus, which existed prior to the Nationality Act of 1940. The fallacy of appellant's argument was exposed in *Gonzalez-Gomez v. Brownell*, 114 Fed. Supp. 660 (S. D., Calif., 1953), where Judge Byrne declared (p. 661):

"* * * The statute does not deprive *any* citizen of his day in court. It merely limits relief under this *particular* statute to specified situations, and those who do not fall within the provisions of the

statute are left to the remedies, such as habeas corpus, which existed prior to its enactment.” (Emphasis of the Court.)

Congress, in the Immigration and Nationality Act of 1952 merely set up different procedures for determining the citizenship claim of one who has been excluded from the United States. Sections 360(b) and (c) of the Immigration and Nationality Act of 1952, 66 Stat. 273, 274, 8 U. S. C. A., Sections 1503 (b) and (c), provide for the issuance of a certificate of identity to such person for admission to the United States, a final determination by the Attorney General of his claim to citizenship, and a review of an adverse decision by the Attorney General “in habeas corpus proceedings and not otherwise.”¹³ There is no vested right in procedure which makes it constitutionally immune to change by Congress [*Barber v. Yanish*, 196 F. 2d 53, 54, footnote 1 (C. A. 9, 1952), and cases cited therein: *Avina v. Brownell*, 112 Fed. Supp. 15, 19-20 (S. D. Tex., 1953)]. And habeas corpus proceedings are sufficient to meet the demands of due process, for even in these proceedings, appellant, if he meets the necessary criteria, may be entitled to a trial *de novo* on his claim of citizenship [*Ng Fung Ho v. White*, 259 U. S. 276 (1922); *Carmichael v. Delaney*, 170 F. 2d 239 (C. A. 9, 1948)].

The cases relied upon by appellant are distinguishable upon at least two bases. In the first place, each of those proceedings was in habeas corpus, of which the court unquestionably acquired a general jurisdiction. Secondly,

¹³These administrative remedies must be exhausted before resort may be had to the courts [See, *Garcia v. Del Guercio*, 227 F. 2d 327 (C. A. 9, 1955); *Ramos-Rivera v. Del Guercio*, 227 F. 2d 406 (C. A. 9, 1955)].

in each of the cases, the person claiming citizenship was resisting affirmative governmental action, either deportation or exclusion.

In the instant case, however, appellant is resisting neither deportation nor exclusion. While it is true that appellant was excluded from admission into the United States during 1947, Paragraph XII of his petition makes it clear that, after having been excluded, appellant on or about September 21, 1951, managed to reenter the United States "and ever since said time has lived and resided in the United States and now resides at Gardena, Los Angeles County, California. . . ." [R. 7.] Appellant does not allege that since his 1951 reentry the appellees have instituted deportation proceedings against him or in any other way denied his claimed rights as a national; and the affidavit of Albert Del Guercio shows that no further proceedings have been taken against appellant since that date.¹⁴ If and when deportation proceedings are instituted against appellant, he may then be able to bring himself within the purview of the cases he cites.¹⁵

¹⁴Conceivably, the appellees, mindful of the burden of proof prescribed in cases of this kind by *Gonzales v. Landon*, 350 U. S. 920 (1955), may conclude that appellant was not expatriated, and take no further action against him.

¹⁵The adjudication of alleged constitutional rights in a declaratory judgment action is not to be encouraged. (*Fletes-Mora v. Brownell*, No. 14,454 (C. A. 9, Dec. 9, 1955—not yet reported) F. 2d)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the order of the District Court, dismissing appellant's Petition for Declaratory Judgment and for Determination of United States Citizenship, should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney

Chief of Civil Division,

JAMES R. DOOLEY,

Assistant U. S. Attorney,

Attorneys for Appellees.



No. 14908

United States
Court of Appeals
for the Ninth Circuit

PANCHO BARNES, Also Known as FLOR-
ENCE LOWE BARNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division.

FILED

APR 20 1956



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PANCHO BARNES,
aka FLORENCE LOWE BARNES,
P. O. Box 37,
Muroc, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

PERRY W. MORTON,
Asst. U. S. Attorney;

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys,
Dept. of Justice,
Washington 25, D. C.

In the District Court of the United States, Southern
District of California, Northern Division

No. 1221 ND

(MISS) PANTHO BARNES, a/k/a FLORENCE
LOWE BARNES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT FOR DAMAGES

Plaintiff alleges:

I.

This action arises under Title 28, United States Code, section 1346 (b), as hereinafter more fully appears.

II.

Plaintiff resides in the County of Kern, state of California, in the Southern District of California, Northern Division.

III.

The tort claim for which plaintiff sues arises from acts which occurred at Kern County, state of California, in the Southern District of California, Northern Division.

IV.

On December 7, 1941, the plaintiff's airport was closed [2*] by order of the United States Govern-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ment. Said airport was used by the Government. After the other airports were opened in 1943, plaintiff's airport was kept closed. After the West Coast Defense Command approved the opening of plaintiff's airport, an order came through from Washington to keep plaintiff's field closed. Plaintiff succeeded through drastic action in the opening of her airport in October, 1945. However the Air Corps and later the Air Force used every means to hamper the plaintiff's business and have succeeded in keeping her business from attaining a fraction of its natural growth and used drastic and illegal means so to do. Continuously without cessation the Air Force and/or their agents have harassed the plaintiff and have tried and have ultimately succeeded in gaining illegal control of her property and have violated her Constitutional rights under the V Amendment. There has been a continuous tort committed against the plaintiff resulting in a partial taking or inverse condemnation of plaintiff's property and damage to her business. This complaint is not to be confused with the actual and illegal condemnation suit filed by the government but is for damages in addition to any damages arising from said condemnation suit and the price of the property involved should the plaintiff consent to eventually settle amicably with the United States Government on the condemnation suit and damages accrued therefrom.

V.

At all times mentioned herein plaintiff was the owner and operator of the Rancho Oro Verde in

Kern County, California, consisting of a guest ranch, hotel, restaurant, bar, dance hall, rodeo grounds, swimming pool, race track, hog, cattle and horse business and airport business.

VI.

As the proximate result of the said continuous tort and inverse condemnation the plaintiff has been damaged in the amount of [3] One Million Five Hundred Thousand (\$1,500,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendant for One Million Five Hundred Thousand (\$1,500,000.00) Dollars, for costs of suit, and for such other and further relief as to the court may seem proper.

/s/ PANCHO BARNES,
Plaintiff In Pro. Per.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 28, 1955. [4]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS AND
MOTION TO DISMISS

Notice of Motion to Dismiss

Please Take Notice that on the 4th day of April, 1955, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, the undersigned will move

this Court, in the United States Courtroom, United States Post Office and Courthouse, Fresno, California, for an order to dismiss this action.

Dated this 14th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

MARVIN ZINMAN,
Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Motion to Dismiss

The defendant moves the Court as follows:

(1) To dismiss the Amended Complaint on the ground that this Court is without jurisdiction over the person of the defendant.

(2) To dismiss the Amended Complaint on the ground that this Court is without jurisdiction over the causes of action alleged in said Amended Complaint.

(3) To dismiss the Amended Complaint on the ground that it fails to state a claim against the [8] defendant upon which relief may be granted.

Dated this 14th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

MARVIN ZINMAN,
Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 15, 1955. [9]

United States District Court, Southern District of
California, Northern Division

No. 1221 ND

(MISS) PANCHO BARNES, aka FLORENCE
LOWE BARNES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER RESETTING MOTION

Good cause appearing, It Is Hereby Ordered that
The motion of the defendant filed on March 15,

1955, to dismiss the Complaint in the above-entitled action heretofore noticed by the moving party for hearing for the 4th day of April, 1955, at 10 o'clock a.m. be, and the same is hereby reset for hearing by the above-entitled court for the hour of 10 o'clock a.m. Friday, April 1, 1955, at the courtroom of the United States District Court of the Northern Division, Southern District of California at Fresno, California.

Dated: March 23, 1955.

/s/ LEON R. YANKWICH,
Chief U. S. District Judge.

Copies received.

[Endorsed]: Filed March 23, 1955. [13]

[Title of District Court and Cause.]

AFFIDAVIT OF BIAS AND PREJUDICE
DISQUALIFYING JUDGE

United States of America,
County of Los Angeles,
State of California—ss.

Pancho Barnes, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled cause.
2. I did not file this or any affidavit of prejudice ten days prior to the opening of this term at which the defendant's motion to dismiss is to be heard for the reason that the first knowledge I had that the

Honorable Leon R. Yankwich would hear the matter in Fresno on April 1, 1955, was on March 29, 1955.

3. That the Honorable Leon R. Yankwich, before whom this motion to dismiss is to be heard, has a personal bias and prejudice against me, and that the facts and reasons for such belief are as follows:

Chief Judge Yankwich first showed bias and prejudice by going all the way to Fresno and placing himself on a case that was [14] in the process of being heard by the Honorable Campbell Beaumont. That Judge Yankwich made numerous remarks in that case in which affiant was a defendant, which were intended to and/or did intimidate and influence Judge Beaumont against this affiant. That Judge Yankwich showed prejudice in the same case by paying attention to citations made by the United States Attorney but when the affiant attempted to cite a case very much in point he said "I am not interested in what the Judge there did. I am interested in this particular case." Judge Yankwich showed prejudice by not allowing this affiant to finish her argument before him. At the time, affiant remarked that she thought that Judge Yankwich had already made up his mind, probably before the case started, to issue an injunction against her. He refused to let her make any further argument and threatened to send her to jail for contempt of court. This affiant feels that Judge Yankwich was influenced against her and is prejudiced against her. Judge Yankwich has shown further prejudice by

refusing to see this affiant at any time in his chambers on routine ex parte matters. That he further refused to see her in his chambers even in conference with Assistant United States Attorney Max F. Deutz, who is opposing counsel in the above-entitled matter, and who also desired a conference. That Judge Yankwich talked with Attorney Deutz while he was with this affiant on the telephone but refused to talk with affiant. This affiant is informed and believes and therefore alleges that Judge Yankwich would be knowingly and with further prejudice placing this affiant in jeopardy by insisting on hearing any case of hers as he threatened her with jail for contempt when she did not in fact or in any way show or intend any contempt. Judge Yankwich's subsequent actions and attitude has done nothing to reassure the affiant and said affiant believes that Judge Yankwich is so prejudiced against her that any decision that he might make would be biased. The Honorable Peirson M. Hall has already heard portions of this case. Before Judge Yankwich usurps jurisdiction [15] in this case as he did in the other for the sole purpose of wreaking his bias and prejudice on this affiant, affiant would stipulate to have the cause heard in Los Angeles for the convenience of the Judge who already has jurisdiction of the matter.

Dated: March 29, 1955.

/s/ PANCHO BARNES,
Plaintiff.

Subscribed and sworn to before me this 29th day of March, 1955.

[Seal] /s/ JOAN H. MARTIN,
Notary Public in and for the County of Los Angeles, State of California.

Certificate Supporting Affidavit

I herby certify that I am appearing in propria persona in the above-entitled cause, and that the above affidavit is made in good faith.

/s/ PANCHO BARNES,
Plaintiff in Pro. Per.

Copy received.

[Endorsed]: Filed March 30, 1955. [16]

[Title of District Court and Cause.]

ORDER RE: DISQUALIFICATION
OF JUDGE

An Affidavit of Bias and Prejudice Disqualifying Judge having been filed by the plaintiff, Pancho Barnes, in the above-entitled matter on March 30, 1955, and the plaintiff, Pancho Barnes, appearing in propria persona, having made an oral motion in Open Court on April 1, 1955, asking the disqualification of Leon R. Yankwich, United States District Judge, on the grounds of bias and prejudice, and the Court having examined the Affidavit and hav-

ing heard the argument of plaintiff, Pancho Barnes, and being fully satisfied in the premises,

Now Therefore, It Is Hereby Ordered that the motion of the plaintiff, Pancho Barnes, for the disqualification of Leon R. Yankwich, United States District Judge, to hear the above-entitled matter should be, and hereby is, denied, and the Affidavit is [18] ordered stricken as legally insufficient and scandalous.

Dated: This 7th day of April, 1955.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed April 8, 1955. [19]

United States District Court, Southern District
Of California, Northern Division

Civil 1221 ND

(MISS) PANCHO BARNES, aka FLORENCE
LOWE BARNES, et al.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT OF DISMISSAL

The above-entitled matter having come on for hearing at Fresno, California, on April 1, 1955, on a Motion to Dismiss plaintiff's First Amended Com-

plaint brought by the defendant, United States of America, the plaintiff, Pancho Barnes, appearing in propria persona, and the defendant United States of America, being represented by Laughlin E. Waters, United States Attorney and Max F. Deutz, Assistant United States Attorney, and the Court having received arguments both written and oral, and it appearing to the Court that the complaint on file herein fails to state a claim against the defendant on which relief can be granted, and the Court being fully satisfied in the premises,

Now Therefore It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action shall be, and hereby is, dismissed.

Dated: This 12th day of April, 1955.

/s/ LEON R. YANKWICH,

United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed, docketed and entered April 12, 1955. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF AP-
PEALS FOR THE NINTH CIRCUIT UN-
DER RULE 73(b) AND TITLE 28 U.S.C.A.
(REVISED) SECTION 1292

Notice is hereby given that Pancho Barnes (also known as Florence Lowe Barnes), plaintiff above

named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment of dismissal dated and entered April 12, 1955, of the above-entitled action.

1. On the grounds that the plaintiff did sue on a continuous tort which tort did start in 1941 and was still in continuance up and until February 27, 1953, which was the date on which a condemnation suit was filed by the government. The subject suit was filed some ten months previously in 1952. The Honorable Judge Yankwich stated that "the acquisition of the property through condemnation by the government put an end to the action." The subject action has nothing to do with the later filing by the government of a condemnation suit, nor did the government have the power to terminate an action merely by the filing of another action.

2. The Honorable Leon R. Yankwich has on two occasions appeared on the bench in plaintiff's cases. In one instance on a case which [22] was then in trial before another judge who was not engaged that day and could have heard said hearing and in the instant case in which the case had been set before Judge Tolin and the Honorable Judge Yankwich did set the case ahead of the regular hearing date and hear it himself.

The plaintiff did make an affidavit of prejudice which was true and according to prescribed law and did recite in brief the excerpts from many paragraphs of the transcript. The Honorable Judge

Yankwich did say "The only truthful thing in your affidavit is that I refused to see you." The plaintiff feels that in this statement the Honorable Judge Yankwich did accuse the plaintiff of the violation of her oath and in short accused her of perjury and only further did make a display of his unmitigated prejudice toward the plaintiff.

/s/ PANCHO BARNES,
Appellant in Propria Persona.

Copy received.

[Endorsed]: Filed (with receipt of Service by Defendant) June 9, 1955. [23]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Pancho Barnes, plaintiff in the above-entitled action is about to appeal to the Circuit Court of Appeals for the Ninth Circuit from judgment entered in said action on April 12, 1955, in the District Court of the United States, for the Southern District of California, Northern Division.

Now Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile and Casualty Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all costs if the appeal is dismissed or the judgment affirmed,

or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile and Casualty Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 20th day of June, 1955.

NATIONAL AUTOMOBILE AND CASUALTY
INSURANCE COMPANY,

By /s/ WILLIAM E. FORTNEY,
Attorney-in-Fact.

I hereby approve the foregoing bond.

Dated the 21st day of June, 1955.

/s/ LEON R. YANKWICH,
Judge.

Examined and Recommended for Approval as provided in Rule 13.

/s/ PANCHO BARNES,
In Pro. Per. [26]

State of California,
County of Los Angeles—ss.

In this 20th day of June, in the year 1955, before me, Loraine G. Winston, a Notary Public in and

for said County and State, personally appeared William E. Fortney known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the National Automobile and Casualty Insurance Co., and acknowledged to me that he subscribed the name of the National Automobile and Casualty Insurance Co., thereto as surety, and his own name as Attorney-in-Fact.

/s/ LORAIN G. WINSTON,

Notary Public in and for Said
County and State.

My commission expires July 21, 1956.

[Endorsed]: Filed June 21, 1955. [25]

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD ON
APPEAL UNDER RULE 75(a) R. C. P.

Comes now the appellant and pursuant to Rule 75(a) R.C.P., designates the following as the contents of the record on appeal:

1. Amended complaint for damages;
2. Notice of motion to dismiss amended complaint;
3. Motion to dismiss amended complaint;
4. Order resetting motion from April 4, 1955, to April 1, 1955;
5. Affidavit of bias and prejudice disqualifying judge;

6. Order re: Disqualification of judge;
7. Judgment of dismissal;
8. Reporter's transcript of proceedings, April 1, 1955, pages 1 through 24. Honorable Leon R. Yankwich, Judge presiding: [27]
9. Notice of appeal to the Court of Appeals for the Ninth Circuit under Rule 73(b) and Title 28, U.S.C.A. (Revised) Section 1292;
10. Undertaking for costs on appeal;
11. This designation.

Dated: July 15, 1955.

/s/ PANCHO BARNES,

Pancho Barnes, Appellant
in Propria Persona.

[Endorsed]: Filed July 15, 1955. [28]

[Title of District Court and Cause.]

STIPULATION TO EXTEND TIME TO
DOCKET RECORD ON APPEAL, AND
ORDER THEREON

It Is Hereby Stipulated by and between the plaintiff-appellant, Pancho Barnes, also known as Florence Lowe Barnes, in propria persona, and the defendant-appellee, United States of America, by its attorneys Laughlin E. Waters, United States Attorney, and Richard A. Lavine, Assistant U. S. Attorney, that the clerk of the United States District Court may have to and including ninety (90)

days from the time of filing notice of appeal in the above-entitled action, namely, June 9, 1955, in which to docket said appeal with the Court of Appeals, Ninth Circuit.

Dated: July 15, 1955.

/s/ PANCHO BARNES,
Plaintiff-Appellant.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

By /s/ RICHARD A. LAVINE,
Attorneys for Defendant-Appellee, United States of
America.

It Is So Ordered. This 15th day of July, 1955.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed July 15, 1955. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 30, inclusive, contain the original

Amended Complaint for Damages;
Motion & Notice of Motion to Dismiss, etc.;
Order Resetting Motion;
Affidavit of Bias and Prejudice Disqualifying
Judge;
Order Re: Disqualification of Judge;
Judgment of Dismissal;
Notice of Appeal;
Cost bond on Appeal;
Designation of Record on Appeal;
Stipulation to Extend Time to Docket Record
on Appeal

which, together with 1 volume of Reporter's Transcript of Proceedings in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 18th day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

In the United States District Court, Southern
District of California, Northern Division

Nos. 1146-ND and 1221-ND

(MISS) PANCHO BARNES, aka FLORENCE
LOWE BARNES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Leon R. Yankwich, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

PANCHO BARNES,

In Pro Per.

For the Defendant:

LAUGHLIN E. WATERS,

United States Attorney, By

MAX F. DEUTZ,

Assistant United States Attorney.

Friday, April 1, 1955, 10:00 A.M.

The Clerk: There are two Barnes matters, **and**
the Burns matter.

The Court: All right, call them in order.

The Clerk: 1146, Pancho Barnes vs. United States.

Miss Barnes: Ready, your Honor. Did you have a chance to read the affidavit of prejudice that I filed?

The Court: Yes, I have read it. I have read the affidavit of prejudice.

Miss Barnes: What do you think about it?

The Court: Well, I am not answering questions. If you have anything to add to it, why, I will let you add to it.

Miss Barnes: May I add to it at this time?

The Court: Not to the affidavit, but any legal reason you can give, I will listen to it.

Miss Barnes: Well, your Honor, you made a great many references at that time and through that case as to me representing myself as an attorney, which is my constitutional right, and I would like to add that to my objections to appearing before you.

The Court: All right.

Mr. Deutz, in the affidavit it is stated that I talked to you but I wouldn't talk to her on the phone. Will you state for the record the one question you asked me and the [2*] answer I gave you, on Friday?

Mr. Deutz: The statement, as I recall, was I asked your Honor over the telephone if Miss Barnes and I could come down to your chambers to discuss the matter with you, and at that time you advised me that you did not wish to discuss the matter, that

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

you felt the proper procedure was to file an affidavit of prejudice in the proper form and you would make your ruling thereon.

The Court: That is right. She was near you, where she could hear what you said?

Mr. Deutz: She was next to me at the telephone at the time I made the call.

The Court: Did I make any other statement in regard to the case, other than the statement if she has any grounds for disqualification to file them in an affidavit?

Mr. Deutz: My recollection is that was all that was said.

The Court: All right.

Miss Barnes: Also, your Honor, at that time Mr. Deutz was sort of reticent to tell you exactly what I had in mind, and I asked him to, and then I said, "Here, let me talk to his Honor."

And Mr. Deutz said, "Well, just a minute, she would like to speak to you," or words to that effect, and I started taking the phone, and I heard you over the phone saying, "Well, I won't talk to her; I won't talk to her." [3]

The Court: That is correct. I do not talk to litigants, and you are a litigant. The only truthful thing in your affidavit is that I refused to see you, because you have sought, every time you filed a paper, an opportunity to present it to me in person, and the word you received was those were to be filed with the clerk, because it is not the custom to talk to litigants, and while you appear in pro per that

doesn't make you a lawyer, and we do not talk to litigants.

Miss Barnes: I disagree with you, your Honor. It doesn't make me a lawyer, except according to myself, but I certainly should receive the same consideration as a lawyer.

The Court: We do not talk to litigants. We talk to lawyers because lawyers know the ethics of the profession, and litigants do not.

All right, anything further you want to say?

Miss Barnes: Well, yes. I would like your Honor to look at an opinion written by Judge Fee, of the Ninth Circuit Court of Appeals. In fact, there are two here. In other words, this one I would like your Honor to look at. (Handing document.)

The Court: Well, I don't think those bear upon the question. I am familiar with this opinion. This merely decides a certain appeal is premature. I don't know that has anything to do with this. [4]

Miss Barnes: It decides much more than that, your Honor.

The Court: Well, I am not interested in that. What I am hearing now, is there anything more you want to say on your motion to disqualify me?

Miss Barnes: This is still on the motion to disqualify you, your Honor. At the end of that motion, that is your own case, the injunction case which I appealed, and it was dismissed as moot. However, if you will read the last paragraph you will see it can be reopened at the proper time.

The Court: Well, all right.

Miss Barnes: But you will find in the original opinion that I showed you that the Appeals Court

did not agree with many comments that you made in the injunction case which really had nothing to do with the injunction, and it happened his Honor, Judge Beaumont, did more or less follow some of the words that you had said in there, which had nothing to do with the injunction but did apply to the court case then in front of him.

The Court: All right. You may be seated. Have you finished?

Miss Barnes: Well——

The Court: I am not going to engage in a dialogue with you. I will listen to you to the extent you want, but you will have to sit down when you are through so I can hear from the other side, and say what I want to say for the record. [5]

Miss Barnes: I feel, your Honor, that you are prejudiced.

The Court: All right.

Miss Barnes: From a sporting standpoint, if I feel that way you shouldn't sit on my case, because I am sort of like a rabbit in a trap and you are the hunter.

The Court: All right.

Mr. Deutz: May I ask that both affidavits be considered in both cases, your Honor, as identical?

The Court: They are the same.

The motion to disqualify will be denied, and the affidavits will be ordered stricken from the file because they are scandalous, not only as to this Court, but as to the memory of the late Judge, because it is alleged that I dominated the late Judge Beaumont. This is a procedure which is permitted,

in fact, it is the procedure which Judge Youngdahl followed recently when the government sought to disqualify him on as flimsy grounds as Miss Barnes is trying to disqualify me.

The trouble with Miss Barnes is that she does not understand the law and every time that—please sit down—every time the judge rules against her she tries to do something about it. She has a right to appeal, of course, but the Congress of the United States provided in Section 144 that whenever a party to an action files a timely affidavit that the judge before whom the matter is pending has a personal [6] bias or prejudice either against him or in favor of an adverse party, said judge shall proceed no further in the matter. The section requires that facts are to be stated. The mere statement that the litigant believes the judge is prejudiced is no sufficient. It says “shall state facts.”

As a matter of fact, there is pending before the Congress at the present time a bill that would change this and allow the mere statement to go, but that is not the law at the present time, and the courts of appeal, including our own, have held repeatedly that the mere fact that the judge has ruled against the litigant, and has done it repeatedly, does not constitute bias or prejudice. All that is here alleged is that I ruled against the litigant here in an injunction matter and a claim that I didn't follow the law. Well, of course, there is an appeal from that if I didn't follow the law, why, the court can correct it.

But the Supreme Court of the United States—

this is a shotgun section. It is not like the State courts. In the State courts if an affidavit is filed against the judge, the judge is allowed to file a counter-affidavit. Then he calls in a third judge, another judge, and that judge determines whether on the basis of the affidavits it is disqualification. There is no such thing here.

If the affidavit is legally sufficient, that is, if it states facts that show a bias or prejudice, not ruling against [7] a party, but a personal bias, an enmity towards the litigant, then the judge must immediately disqualify himself, and the courts have held—one of the courts of appeal said, in *Tucker vs. Kerner*, a case from the Seventh Circuit, that the duty to deny the affidavit on insufficient allegations is not less imperative than to allow it on sufficient allegations.

In other words, a litigant is not permitted, whether it be the government, whether it be a big corporation, as happened to be the case with Metro-Goldwyn-Mayer in the case where they sought to disqualify me and I held I wasn't disqualified and the Court of Appeals agreed with me.

In other words, we do not allow the very thing Miss Barnes thinks they should allow, that because she thinks I am prejudiced I ought to disqualify myself. We do not allow a litigant to choose judges. And bias means a personal hatred, a personal animosity arising not from the litigation but for other reasons, extraneous reasons, and this is what the Supreme Court said in the famous case, interpreting

the section, *Ex Parte American Steel Barrel Company and Seaman*, a very famous case:

“The basis of the disqualification is that personal bias or prejudice exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a [8] provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust the judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.”

Repeated rulings against the litigant, no matter how erroneous—I am adding this, this is not in the quotation—no matter how erroneous, and how vigorously and how consistently expressed, are not disqualifying.

The Court of Appeals for the Ninth Circuit has ruled consistently to that effect. Some of the lead-

ing cases are *Price vs. Johnston*, 125 Fed. (2) 806, at 811, 812; *Beecher vs. Federal Land Bank of Spokane*, Washington, 153 Fed. (2) 987 and 988. [9]

That is a very interesting case because Beecher, like Miss Barnes, is a pro per litigant, and he has been litigating with the Land Bank before Judge Dryer for a long, long period of time, and every so often Beecher files a new affidavit of disqualification, claiming that the judge has ruled so consistently against him that he must be prejudiced, and each time the Court has said that is not the law. I want to read this last case, Beecher case; it is very interesting because Beecher too is appearing for himself.

“Appellant contends that the district judge became disqualified on November 7, 1943, by the filing of a claimed affidavit of prejudice. The gravamen of the affidavit is the successive rulings of the judge adverse to appellant and his comments on the appellant’s method of conducting his case. We do not think they constitute personal prejudice against appellant and affirm the order of the district judge declining to disqualify himself.”

The motion to disqualify will be denied, and the affidavit will be ordered stricken from the record as scandalous.

Miss Barnes: May I speak now?

The Court: No.

Miss Barnes: Will you make a written order?

The Court: That order is sufficient. [10]

Miss Barnes: I want to appeal the order.

The Court: That is all right, that order is sufficient.

Miss Barnes: To appeal?

The Court: Yes. The minute order has been entered. We will now proceed to hear the matter on the merits.

Mr. Deutz: There are two cases, 1221 and 1146. We had earlier motions in both these cases.

The Court: Please be seated while other counsel is talking, madam. That is the rule of the Court.

Mr. Deutz: We had earlier motions in both of these cases, and the plaintiff voluntarily amended the complaints——

The Court: I am aware of the facts. I have looked at the file.

Mr. Deutz: Very well, then, I don't know of any further argument——

The Court: And the motion I looked at the other day when I was here, and I looked at it again, and the new motion—wait a minute, I have clipped the last complaint. It is a rather short complaint. What number are we on now, 1221? The complaint is the one filed, new amended complaint, the brief complaint.

Miss Barnes: 1146.

The Court: Filed February 28th. All right.

Mr. Deutz: You are discussing 1221 now. As to both complaints, I think we would be willing to submit the [11] government's motion on the written motion——

The Court: Well, no, don't do that, because I

want to hear your matter, because there are no contrary authorities and I want to hear the others, so you can summarize what you state in your memorandum.

Mr. Deutz: Very well, your Honor.

As to 1221, the objection there is in two parts, although it is in one cause of action. The plaintiff complains there that during the war the government closed down her airport. She maintains a private airport used by private aircraft, or did maintain, on the premises of a ranch adjoining the Edwards Air Force Base, and during the war this airport was closed. Now, since action was recently taken to condemn the land in other proceedings in this court, she is no longer in the possession of that land and has moved elsewhere. However, she is claiming that the Air Force in closing down the airport during the war and subsequently, has carried on certain courses of conduct, not specified, wherein she states they have succeeded in keeping her business from attaining a fraction of its natural growth and have otherwise impaired and violated her right to control of her property.

Now, it is our position that as far as anything that has happened prior to two years from the filing of the original complaint here there could be no cause of action under the Federal Tort Claims Act, because of the two-year [12] statute of limitations. However, she does specify something here which she denominates as a continuous tort committed against her which constitutes a partial taking

or inverse condemnation of the plaintiff's property and damage to her business.

Now, at the time that this complaint was filed she was still in possession of that business, so that if there were in fact a continuing tort there might be some basis for a cause of action there. However, there is no actual continuous tort specified other than an alleged interference with her business.

Now the Federal Tort Claims Act, in Section 2680, specifically provides that there will be no cause of action against the United States for anything constituting interference with contract rights, and that would appear to be the only type of tort that she has specified here, and for that reason we think that the claims under this complaint are barred; the earlier ones barred by the statute of limitations, and the more recent ones, if any, barred by the fact that there is a specific exception to claims involving contract rights.

I think that is the gist of action 1221.

Now, action 1146 is a companion case, and 1146 is set up in two counts, and in the first count, first cause of action, the allegation is that the United States Government, [13] by certain alleged misrepresentations of certain of its officers to the Post Office Department of the United States Government, changed the name of the Muroc post office to Edwards post office, and by reason of that change of name there has been certain damage to the plaintiff by individuals being led to believe that—I will strike that—there has been some confusion in the

mail and resulting loss of business. Now, exactly how that would arise is not specified except that the allegation reads:

“The change of name from Muroc to Edwards caused confusion in the mail and to the guests and patrons of the plaintiffs’ guest ranch, resulting in loss of business. The resulting publicity in the change of name led many patrons of the guest ranch to believe that said ranch had gone out of business.”

Well, the change of name was that of the post office. It is our contention that any action taken by the post office to change the name of a post office is strictly a discretionary act and as such would lie within the exceptions of Section 2680(a) of Title 28, United States Code, which provides that a cause of action under the Federal Tort Claims Act will not lie where the acts complained of are the result of discretionary acts on the part of government employees, even though that discretion might be abused, and under those circumstances I feel that the first cause of action is not [14] well taken.

The second cause of action is somewhat different. In that case the plaintiff has alleged a concussion resulting from certain activities of the employees of Edwards Air Force Base, which so cracked and damaged the plaintiffs’ swimming pool that repair was inadvisable and it was deemed necessary to build a new pool. In addition, the negligent concussion damaged several ranch and hotel buildings, and the underground irrigation pipes, and so forth.

Now, as to that second cause of action, I must concede that if there is in fact a tort then there would be a cause of action under the tort claims act, provided the action is timely brought, and to that extent it may well be that the motion to dismiss as to that cause of action is not well taken, but in lieu thereof we would request the Court to grant a motion for a more definite statement, specifying the exact occurrences on which the concussion took place, specifying them as to time and as to the number of repetitions.

The Court: She has alleged that within two years.

Mr. Deutz: She alleges within two years——

The Court: That is sufficient for the purpose of the motion to dismiss.

Mr. Deutz: Well, that is possibly true, and we will have to take discovery procedures to establish whether or not they were in fact within two years.

So I am stating to the Court at this time that I feel that she possibly has a valid cause of action at the present posture of the case, but the first cause of action is not valid under any circumstances and should be stricken.

The Court: All right, I will hear you.

Miss Barnes: I am going to take 1146-ND, which is the case he just finished talking about, first, which regards the change of name of the post office.

I know the government has wide discretionary power in what they may do. I know that a negli-

gent act or tort claims act is an act in which they are negligent. Now, the Air Force were not negligent in asking the post office to change the name, but they were misinformative to the post office as to the condition, and the post office believed them and changed the name.

That is the first point of that, and as Mr. Deutz says, he rather concedes that the rest of that case is possibly a proper case, your Honor.

Now, going on to the other case, which is 1221-ND?

The Court: That is right, 1221.

Miss Barnes: That is, your Honor, what I believe is known as an inverse condemnation case. In 1941 the government closed all the airports. Now, in a great many cases they did not take them over and use them, they just closed them; but they took my airport over shortly after that and used it throughout the war. I never made any claim on that at all.

I drew up a very full and large and detailed complaint, and the United States Attorney's office criticized that complaint, because they said it was a narrative complaint and there was too much in, and consequently the complaint now, which is an amended complaint, is not detailed, and the reason it is not detailed is because the point is to state merely what the complaint should be, and all of the small intricacies of it should be brought out later at the time of trial.

Nevertheless, starting as of December 7, 1941 when the government by order closed all of the air-

ports, then shortly after took over the use of my airport, they just used it, to which I made no objection at the time. We were in a very crucial state of war at the time and that was no time to object to anything, and consequently they went ahead and used it.

In 1943, I believe, they opened most of the airports. They refused to open my airport. I had to take semi-legal action; in other words, I went before a department composed of the C.A.A., the Navy and the Army. The Air Force rigorously attempted to keep my airport closed after that time. That was 1945, and it was later opened by the vote of the Navy and the C.A.A., the Air Force still resisting the opening of that airport.

Now, they kept the airport closed there two years after it should have been opened, in an arbitrary fashion and for no reason at all. They never offered any compensation, they were using the airport at the time.

From there on down, your Honor, we have a pretty well authenticated case now which has come out of all these various cases and things we have had with the government. We have got the story, and we have found out that the government has coveted and wanted that property, and we have found out it was illegal, their taking of it, which case I am going to prove later, and through the courts I think it will finally come out that the government has had no legal basis for the taking of it,

or any necessity for it, and it has been a great abuse of discretion. That, of course, is on the condemnation suit.

This case here has nothing to do with the condemnation suit. This case is simply that they tried to harrass me off that property in order to take or control it years ahead of when they needed it, or when they may even have had any congressional right to take it, the use of that property dating back to 1941.

That situation has never abated. In other words, it is a question of continuous inverse condemnation, or a continuous taking of that property. Mr. Deutz is speaking of implied contract, it may have been an implied contract legally, but it certainly wasn't intended as such; it was [18] intended simply as the taking of the property.

Now, I think your Honor has felt all through this proceeding, or any contact that he has had with me, that I am a very arbitrary person, a very capricious person, that I am an opinionated person, that I would like to ask a judge to disqualify himself only because he ruled against me. I believe that your Honor has had that impression right straight through. I think your Honor has had the impression that my fighting the condemnation case has been simply an arbitrary act on my part.

The Court: That has already been decided. We are talking now about the sufficiency of the complaint. The other matter has already been disposed of.

Miss Barnes: Yes. But I wish to say there has been a continuous tort, a continuous procedure against me, and as late as this year when I sued the General and had a case against him in Judge Carter's court, the legal officer from A.R.D.C. told me so. He stated that that General was put there with the primary reason of getting rid of me. Now, that has gone on right down to the filing of this complaint, and I think I can prove in court that this is all justified.

The Court: You talk about inverse condemnation. It ultimately has to result in a condemnation where you are allowed to receive the full value of your property, then the only cause of action you have predates that and is long since outlawed.

Miss Barnes: I wouldn't say so, your Honor.

The Court: Because after they took over the property, then they took it over under the rules and then your cause of action from then on—they are the owners of the property.

Miss Barnes: Yes, they are the owners of the property——

The Court: Therefore, you cannot change back a cause of action to the present time——

Miss Barnes: Wait a minute, your Honor. They are the owners of the property when, as and if they get it, but they do not own it at this time, and if you will read the opinion of Judge Fee, they only have a very cloudy defeasible title and they do not own the property even as of now. But that is not what I am talking about here, your Honor.

Condemnation of property is of the value of the

land and the property itself. That is not as of the ruining of your business in the taking of your property. In other words, this would mean that they were taking it twice, once over a period of years in small parts, and eventually altogether at a different price—two entirely different things.

The Court: All right. All right, Mr. Deutz?

Mr. Deutz: I have nothing further, your Honor.

The Court: All right. To go back, as to 1221, the motion to dismiss will be granted.

Miss Barnes: Just one minute, your Honor. I would [20] just like to bring up one point here too, maybe you are not cognizant of. This case that we have now for dismissal was filed before the condemnation suit was filed by more than a year.

The Court: Well, that doesn't change the cause of action. This was filed in '52. The question is not when you filed it. The question is when did your cause of action arise, and you allege here the cause of action arose in '41. That is the point.

Miss Barnes: No, but it is continuous, your Honor.

The Court: Very well. The motion to dismiss will be granted, on the ground it doesn't state a claim against the United States, and assuming it states a claim for some kind of trespass, the acquisition of the property through condemnation by the government put an end to the action, and therefore what followed subsequently was done under the power of condemnation and cannot be cumulative so as to make it a continuous tort.

Motion to dismiss will be granted, in that number.

In number 1146, the motion to dismiss will be granted as to the first cause of action, the post office having the right to change the names of post offices, no person can be charged with tort for advising them or inducing them to secure the change. It is only if they had no right that somebody induced them would be breach of a contract. The motion to dismiss will be granted as to that.

The second cause of action, motion to dismiss will be denied, upon the ground that the allegation of paragraph III shows that the acts were done, alleged acts were done within two years. We have to assume that the allegations are correct for the purpose of the motion, and if later on after discovery procedures it should develop that they are not, that the acts preceded the two-year period, then such question may be raised on a motion for summary judgment or pre-trial of the matter.

Miss Barnes: You have also for consideration these were filed originally in early '52, in that length of time.

The Court: All right, you prepare written orders, Mr. Deutz.

Mr. Deutz: Very well, your Honor, I will.

Miss Barnes: You are going to sign them?

The Court: We will declare a short recess.

(Short recess.)

The Court: All right.

The Clerk: Hughes vs. Rudnick.

Miss Barnes: May I please approach the bench? From the Ninth Circuit Court of Appeals they say that a minute order of the Court is not acceptable, and can you instruct Mr. Deutz to prepare a written order in the matter of the prejudice?

Mr. Deutz: If the Court would like a written order on the denial of the petition for disqualification I will prepare it.

The Court: It doesn't matter. A petition for disqualification is not a final order. You do not need to consider it a final order. If you want to, you can make it. There is no appeal from a motion to disqualify.

Mr. Deutz: Well, Miss Barnes apparently thinks there is, and in that case shall I prepare an order?

The Court: There is no appeal. You can issue a writ and it can be used only in criminal cases. It was used in the Shibley case.

Mr. Deutz: Well, if it would satisfy Miss Barnes would it be all right?

The Court: I have no objection. Just make an order——

Mr. Deutz: I will make a short order.

The Court: Just an order denying it on the insufficiency of the affidavit.

Mr. Deutz: Fine. Thank you, your Honor.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 4th day of April A.D., 1955.

/s/ HELEN G. SCHULKE,
Official Reporter.

[Endorsed]: No. 14908. United States Court of Appeals for the Ninth Circuit. Pancho Barnes, also known as Florence Lowe Barnes, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed October 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14908

PANCHO BARNES, aka FLORENCE LOWE
BARNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF RECORD

Appellant, Pancho Barnes, designates the following documents and excerpts from the Reporter's Transcript, to be printed as part of the record:

Eliminate any affidavits of service and insert the words "affidavit of service by mail."

Eliminate title of District Court and cause on each document except on Complaint and Order Resetting Motion.

1. Amended Complaint. Pages 2, 3, 4, 5.
2. Motion to Dismiss. Pages 7, 8, 9, 12.
3. Order Resetting Motion. Page 13.
4. Affidavit of Bias and Prejudice Disqualifying Judge. Pages 14, 15, 16, 17.
5. Order Re: Disqualification of Judge. Pages 18, 19.
6. Judgment of Dismissal. Pages 20, 21.
7. Notice of Appeal. Pages 22, 23, 24.
8. Undertaking for costs on appeal. Pages 25, 26.

9. Designation of Record. Pages 27, 28, 29.

10. Stipulation to extend time to docket record on appeal, and order thereon. Page 30.

11. The following portions of the Reporter's Transcript of Proceedings in the District Court, April 1, 1955:

Page 2—lines 7 through 25, inclusive.

Page 3—lines 1 through 25, inclusive.

Page 4—lines 1 through 25, inclusive.

Page 5—lines 1 through 25, inclusive.

Page 6—lines 1 through 25, inclusive.

Page 7—lines 1 through 16, inclusive.

Page 10—lines 19 through 25, inclusive.

Page 11—lines 1 through 5 inclusive and lines 24 and 25.

Page 12—lines 1 through 25 inclusive.

Page 13—lines 1 through 22, inclusive.

Page 16—lines 19 through 25, inclusive.

Page 17—lines 1 through 25, inclusive.

Page 18—lines 1 through 25, inclusive.

Page 19—lines 1 through 25, inclusive.

Page 20—lines 1 through 25, inclusive.

Page 21—Lines 1 through 19, inclusive.

12. Statement of Points. Pages 1 through 3.

13. Designation of Record. Pages 1 through 3.

Dated this 30th day of November, 1955.

/s/ PANCHO BARNES,

Appellant In Propria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 2, 1955.

[Title of Court of Appeals and Cause.]

COUNTER DESIGNATION OF RECORD

The United States of America, appellee, designates for inclusion in the printed record those portions of the Reporter's Transcript of the Proceedings on April 1, 1955, which were not designated by appellant.

/s/ PERRY W. MORTON,
Assistant Attorney General.

/s/ ROGER P. MARQUIS,

/s/ JOHN C. HARRINGTON,
Attorneys, Department of
Justice, Washington, D. C.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

To: The Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. The District Court erred in making constant references and much criticism that appellant was representing herself, as is her constitutional right.

2. The District Court erred when the Court said, "the only truthful thing in your affidavit is that I refused to see you." The affidavit was made up strictly from the record and reflected a true summary of the Honorable Judge Yankwich's many prejudices. For Judge Yankwich to state that the affidavit was untruthful is a deep insult to the integrity of the appellant.

3. The District Court erred when he stated: "the acquisition of the property through condemnation by the government put an end to the action." The subject suit was filed some ten months previous to the condemnation suit filed by the government and had nothing to do with the condemnation suit, as such, nor could the government by filing an action put an end to an action previously filed only by virtue of merely filing an action such as is here claimed by the Honorable Judge Yankwich.

4. The District Court erred in saying that "you have sought, every time you filed a paper, an opportunity to present it to me in person." The appellant never once tried to present a paper that was to be filed other than those requiring his signature. In two cases she did go to get an ex parte matter cared for. The first time she did not realize that she was being rebuffed, the second time it was made clear to her that any paper she wished to present to the Judge must be sent to him via his clerk.

5. The District Court erred in making the broad statement that "lawyers know the ethics of the profession and litigants do not." This statement is so broad that it is a thin excuse to discriminate against the appellant. While the appellant is not an attorney no other judge has refused her the common courtesy that he accords to her opponents.

6. The District Court erred when he made an order resetting the hearing from April 4, 1955, to April 1, 1955. The case was duly to come on before the Honorable Judge Tolin on April 4th, but Chief Judge Yankwich did move up said case to be heard

by him. This in itself would seem innocent enough except a like incident had previously occurred in a case in trial before the Honorable Judge Beaumont, that Judge Yankwich sat himself on and criticized Judge Beaumont.

7. The District Court erred when he ordered that the affidavit should be stricken from the record on the ground that it was "scandalous." Said affidavit was a simple statement of unvarnished truth and was not scandalous or was it scurilous but in either case it would have still been admissible under the law.

8. The District Court erred in not allowing the appellant to explain the errors of the Court's thinking and deprived the appellant of her rights under the law, not having her day in Court before an impartial Judge.

9. The District Court erred when he said, "all that is here alleged is that I ruled against the litigant here in an injunction matter and a claim that I did not follow the law." The entire statement is not one of fact and is untrue.

10. The District Court erred in not disqualifying himself.

11. The District Court erred in granting Defendant's Motion to Dismiss.

Signed and dated this 30th day of November, 1955.

/s/ PANCHO BARNES,

Appellant in Propria Persona.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 2, 1955.

No. 14908

In the
United States Court of Appeals
For the Ninth Circuit

PANCHO BARNES, Also Known as FLORENCE LOWE BARNES,	}	<i>Appellant,</i>
vs.		
UNITED STATES OF AMERICA,		<i>Appellee.</i>

Appellant's Opening Brief

PANCHO BARNES
In propria persona,
Post Office Box 37,
Muroc, California.

FILED

MAY 18 1956

PAUL P. O'BRIEN, CLERK



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In the
United States Court of Appeals
For the Ninth Circuit

<div style="display: flex; justify-content: space-between;"><div style="width: 80%;"><p>PANCHO BARNES, Also Known as FLORENCE LOWE BARNES, <i>Appellant,</i></p><p style="text-align: center;">vs.</p><p>UNITED STATES OF AMERICA, <i>Appellee.</i></p></div><div style="width: 10%; font-size: 4em; line-height: 1; padding: 0 10px;">}</div><div style="width: 10%; vertical-align: middle;">No. 14908</div></div>
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Appellant's Opening Brief

To the Honorable, the Court of Appeals of the United States for the Ninth Circuit:

This is an appeal from a judgment of the Honorable Leon R. Yankwich, Chief Judge of the United States District Court for the Southern District of California, Central Division, entered on April 12, 1955, in favor of Appellee, defendant below, and against Appellant, plaintiff below, dismissing Appellant's Complaint on Motion to Dismiss made by Appellee. Appellant appealed from said judgment by duly filing her Notice of Appeal [Tr. pp. 13-15].

The action was brought under and by virtue of the provisions of the Tucker Act, 28 U.S.C.A. §1346, upon which jurisdiction in the District Court was founded. Jurisdiction of this Honorable Court is founded upon the provisions of 28 U.S.C.A. §§1291, 1292, and Federal Rules of Civil Procedure, Rule 73(b).

STATEMENT OF THE CASE

Appellant at all times material to this action and for many years prior to the institution of the action owned and operated Ranch Oro Verde in Kern County, California, consisting of a guest ranch, hotel, restaurant, bar, dance hall, rodeo grounds, swimming pool, race track, hog, cattle, horse and airport business [Tr. pp. 4-5]. Appellant brought the action in the case at bar under the provisions of the Tucker Act [28 U.S.C.A. §1346] to recover damages sustained by her by reason of repeated and continuous trespasses made by the Appellee upon her property and to recover damages sustained by reason of a partial taking or inverse condemnation of the same property by reason of the acts of the Appellee [Tr. pp. 4-5].

Appellant filed her initial Complaint in this action on December 3, 1952 [Tr. p. 14]; her First Amended Complaint, the judgment dismissing which is the subject of this appeal, was filed February 28, 1955 [Tr. p. 5].

On February 27, 1953, the Appellee filed a condemnation action and a Declaration of Taking, relat-

ing to the entire fee simple title of the above-mentioned property of the Appellant. The condemnation suit is pending. The suit is entirely separate and distinct from the action in the case at bar [Tr. p. 14].

The Complaint does not spell out the nature of the activities of the Government of which she complains, but it does indicate that the Government closed and kept closed her airport beginning in 1941 until 1945, and that during an unspecified period of time the Government used the airport; the Appellant complained that the Appellee committed a "continuous tort . . . against the plaintiff resulting in a partial taking or inverse condemnation of plaintiff's property and damage to her business" [Tr. p. 4]. The activities of the Government of which complaint was made continued until the time of filing of the initial complaint [Tr. pp. 37, 38, 39]; at the time the initial complaint was filed Appellant was in possession of and had title to the property [Tr. p. 32].

Appellee moved to dismiss the Amended Complaint on the grounds that the Court was without jurisdiction over the person of the Appellee and without jurisdiction over the causes of action alleged in the Complaint, and on the further ground that the Complaint failed to state a claim against the Appellee upon which relief could be granted [Tr. p. 6]. The trial court granted the Motion on the grounds, as stated by the Court:

"The motion to dismiss will be granted, on the ground it doesn't state a claim against the United States, and assuming it states a claim for some

kind of trespass, the acquisition of the property through condemnation by the government put an end to the action, and therefore what followed subsequently was done under the power of condemnation and cannot be cumulative so as to make it a continuous tort.” [Tr. p. 39]

Appellant also filed an Affidavit of Bias and Prejudice Disqualifying Judge Yankwich in support of her oral motion for disqualification; the Court denied Appellant’s motion [Tr. pp. 9-12].

SPECIFICATIONS OF ERROR

Appellant respectfully submits that the District Court erred in the following particulars:

1. In granting the Government’s Motion to Dismiss on the ground that no claim for relief could be stated by Appellant against the Government;
2. In dismissing the action on the ground that any claim for damages for trespass was terminated by the filing of the Government’s condemnation action;
3. In refusing to disqualify himself under the circumstances of this case.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION TO DISMISS ON THE GROUND THAT NO CLAIM FOR RELIEF COULD BE STATED BY APPELLANT AGAINST THE GOVERNMENT.**A. The Court Erred in Granting the Motion to Dismiss.**

It is well established that a Motion to Dismiss should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. The principle is well stated in *John Walker & Sons v. Tampa Cigar Co.*, 197 F. 2d 72 (5th Cir. 1952), wherein at p. 73, the court said:

"... It is also elementary that a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. Even then, a court ordinarily should not dismiss the complaint except after affording every opportunity to plaintiff to state a claim upon which relief might be granted."

In the event the motion is sustained, opportunity to amend should be granted unless the complaint is incurably and hopelessly defective.

Ware v. Travelers Ins. Co., 150 F. 2d 463 (9th Cir. 1945) ;

Kingwood Oil Co. v. Bell, 204 F. 2d 8 (7th Cir. 1953).

A complaint should not be dismissed on motion if it states some sort of claim, inartistically as it may be drawn. This is particularly true where the plaintiff is not represented by counsel.

Brooks v. Pennsylvania R. R., 91 F. Supp. 101 (D.C. S.D. N.Y. 1950) ;

See, also, 5 *Cyc. Fed. Proc.* (2d ed) §§ 15.203, 15.204, 15.206, 15.166; 1 Barron & Holtzoff, *Fed. Proc. & Prac.* (1950), §356.

The Court did not grant Appellant leave to amend [Tr. pp. 39-40]; the original complaint was detailed, but the Appellant amended it, apparently voluntarily, after the Appellee objected to its narrative form [Tr. p. 35].

The Amended Complaint is indefinite in that it fails specifically to state the nature of the activities of the Government of which complaint is made and to state the period of time during which said activities took place. There is no indication that a Motion for a More Definite Statement would not have cured both of these defects. Under such circumstances, a Motion to Dismiss should not be granted.

1 Barron & Holtzoff, *Fed. Proc. & Prac.* (1950) §356, p. 647.

There is some indication that the Government's Motion was, in part, predicated upon its theory of the applicable Statute of Limitations [Tr. p. 31]. Since the Complaint does not specifically state the pertinent dates, however, the matter of limitations does not appear affirmatively from the face of the pleading and

the defense should be raised by way of Answer; or the pertinent information could have been obtained by a Motion for a More Definite Statement.

5 *Cyc. Fed. Proc.* §75.534, p. 545; §15.294;

See *Childers v. Eagle Picher Lead Co.*, 35 F. Supp. 702 (D.C. W.D. Mo. 1940).

B. The Amended Complaint Contained Allegations which Could Entitle Appellant to Relief Against Appellee.

The Appellant brought her action under the Tucker Act, which provides, in pertinent part, as follows:

“(a) The district court shall have original jurisdiction . . . of . . .

“(2) Any other civil action or claim against the United States, not exceeding Ten Thousand Dollars in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” [28 U.S.C.A. §1346; formerly, 28 U.S.C.A. §41(20).]

(b) [T]he district courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death, caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if

a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” [28 U.S.C.A. §1346]

Had Appellant been afforded the opportunity, she may well have been able to state a claim for relief on any one or all of several theories: (1) a claim for relief predicated upon a theory of implied contract with the Government for the temporary use by the Government of her airport; (2) a claim of relief predicated upon a theory of a partial taking of her property, prior to its condemnation, by reason of the Government’s unauthorized use of and activities upon portions of her property other than the airport; or (3) a claim for relief on the theory that the activities of the Government constituted continuous and repeated trespasses (not amounting to a “taking” in the constitutional sense) compensable under the Federal Tort Claims Act [28 U.S.C.A. §1346(b)].

It is well recognized that there may be a “taking” in a constitutional sense, giving rise to an implied contract, by activities of the Government in interfering with the use and enjoyment of the property by the plaintiff or in using the property by the Government, without formal condemnation proceedings.

E.g. *United States v. Dickinson*, 331 U.S. 745 (1947);

United States v. Causby, 328 U.S. 256 (1946).

Furthermore if a landowner suffers special damages from the Government’s use of adjoining property, the landowner is entitled to recover damages for

the diminution in value of his property therefor. Thus, in *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1913) plaintiff owned land near a railroad tunnel, which had been constructed under an Act of Congress. As trains ran through the tunnel, fans blew the smoke and fumes over and upon the plaintiff's property. The Government did not appropriate any of plaintiff's land and did not "take" the property in a physical sense. The plaintiff, however, who had suffered special damages not suffered by the public generally, was entitled to damages; the Court at 557 said:

"... Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation . . . and pending its acquisition defendant is responsible. If the damage is readily preventible [sic], the statute furnishes no excuse, and defendant's responsibility follows on general principles."

On the other hand, the acts of the Government upon the Appellant's property may not have constituted a "taking" or partial taking prior to the institution of the formal condemnation action, but such acts may constitute repeated and continuous trespasses.

The United States Supreme Court in *Dalehite v. United States*, 346 U.S. 15, 45 (1953) has construed the term "wrongful act", as used in the Federal Tort & Claims Act to mean trespass:

"Petitioners rely on the word 'wrongful' as showing that something in addition to negligence is covered. . . [T]he legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of absolute liability. . . rather, Committee discussion indicates that it had a much narrower inspiration: 'trespasses' which might not be considered strictly negligent . . ."

The District Court in *Lemaire v. United States*, 76 F. Supp. 498 (D. Mass. 1948) held that a continuing trespass by the Government was cognizable under the Federal Tort Claims Act.

The Federal Tort Claims Act refers the question of liability to decisions of the state courts in the state in which the act or omission occurred [28 U.S.C.A. §§1346, 2674]; in the case at bar the acts complained of took place in the State of California [Tr. p. 3].

The California cases distinctly recognize and grant relief for continuous trespasses.

Carbine v. Meyer, 126 Cal. App. 2d 386, 390, 272 P. 2d 849 (1945);

Cf. *Phillips v. City of Pasadena*, 27 Cal. 2d 104, 162 P. 2d 625 (1945).

II.

THE DISTRICT COURT ERRED IN DISMISSING
THE ACTION ON THE GROUND THAT ANY
CLAIM FOR DAMAGES FOR TRESPASS WAS
TERMINATED BY THE FILING OF THE GOV-
ERNMENT'S FORMAL CONDEMNATION AC-
TION.

The District Court stated as its ground for granting the Motion to Dismiss that the filing of the Government's condemnation action ended any cause of action the Appellant may have had for damages for trespass.

No authority has been found which would support the District Court's theory.

A contrary principle is stated in 1 Am. Jur. "Abatement and Revival" §45, p. 49:

"The common-law rule that the transfer by the plaintiff of his interest in the subject-matter of a pending action may be pleaded in abatement thereof does not cause the abatement of the action when the *plaintiff transfers the property out of which the cause of action arose*. Thus, consequential damages for injury to real estate accrue to the person owning the land at the time of the injury; and if, after commencing an action for such injury, he sells and conveys the land, this will not affect his right to recover." (Emphasis added.)

Although the point has not been raised squarely in any California case found, *dicta* state the same principles enunciated in the quotation above.

See, *Stufflebeem v. Adelsbach*, 135 Cal. 221, 223-24, 67 Pac. 140 (1901);

Cheatham v. Municipal Court, 112 Cal. App. 114, 116, 296 Pac. 305 (1931).

There is no indication in the Federal Tort Claims Act that any action created thereby shall be terminated by Government acquisition of the property out of which the cause of action arose.

III.

THE DISTRICT COURT ERRED IN REFUSING TO DISQUALIFY HIMSELF UNDER THE CIRCUMSTANCES OF THIS CASE.

Appellant filed an Affidavit of Bias and Prejudice to disqualify Judge Leon R. Yankwich from hearing the Motion to Dismiss. In the affidavit Appellant recited the history of her engagements with Judge Yankwich [Tr. pp. 9-10] which indicated that that Judge entertained personal bias against her.

The attitude which the Honorable Judge Yankwich bore towards appellant is further illustrated by the colloquy occurring in respect of her Affidavit of Bias and Prejudice set forth in the margin.*

For the foregoing reasons, the Appellant contends that she did not obtain a fair opportunity to present her case and by reasons of the errors of law hereinabove mentioned, she respectfully urges that this

* "Miss Barnes: [referring to a conversation which Mr. Deutz had with Judge Yankwich while Miss Barnes was in Mr. Deutz' office] 'Here let me talk to his Honor.' And Mr. Deutz said: 'Well, just a minute, she would like to speak to you' . . . and I heard you over the phone saying, 'Well, I won't talk to her; I won't talk to her.'"

"The Court: 'This is correct. I do not talk to litigants, and you are a litigant. The only truthful thing in your affidavit is that I refused to see you, because you have sought, every time you filed a paper, an opportunity to present it to me in person, and the word you received was those were to be filed with the clerk, because it is not the custom to talk to litigants, and while you appear in pro per that doesn't make you a lawyer, and we do not talk to litigants.'"

"Miss Barnes: 'I disagree with you, your Honor. It doesn't make me a lawyer, except according to myself, but I certainly should receive the same consideration as a lawyer.'"

"The Court: 'We do not talk to litigants. We talk to lawyers because lawyers know the ethics of the profession, and litigants do not.'"

Honorable Court reverse the Judgment and Order of the District Court dismissing her Amended Complaint.

Respectfully submitted,

PANCHO BARNES,

Appellant, In Propria Persona

No. 14908

**In the United States Court of Appeals
for the Ninth Circuit**

PANCHO BARNES, also known as FLORENCE LOWE
BARNES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b) (R. 3).¹ The judgment dismissing the action

¹ In her brief (pp. 2, 7) appellant alleges that "the action was brought under and by virtue of the Tucker Act, 28 U.S.C.A. § 1346." The Tucker Act is the popular name for the Act of March 3, 1887, 24 Stat. 505, providing for the bringing of suits against the United States "in cases not sounding in tort." The jurisdictional

was entered April 12, 1955 (R. 12-13), and notice of appeal was filed June 9, 1955 (R. 13-15). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether an action under the Federal Tort Claims Act was properly dismissed as failing to state a claim on which relief could be granted when the gravamen of the action was the continuous trespasses of government employees amounting to a "taking" of real property, and when an action was subsequently instituted by the United States to acquire fee simple title to the property involved.

2. Whether the refusal of the trial judge to disqualify himself constituted prejudicial error.

STATEMENT

Invoking jurisdiction under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b), appellant prayed for judgment against the United States in the amount of \$1,500,000 (R. 3, 5). In her amended complaint she alleged that at all pertinent times she was the owner and operator of certain property in Kern County, California, "consisting of a guest ranch, hotel, restaurant, bar, dance hall, rodeo grounds, swimming pool, race-track, hog, cattle and horse business, and airport business" (R. 4-5). She stated her cause of action as follows (R. 3-4):

provisions of the Tucker Act with respect to the Court of Claims are now codified in 28 U.S.C. sec. 1491, while the grant of concurrent jurisdiction to the district courts in cases of claims not exceeding \$10,000 appears in 28 U.S.C. sec. 1346(a)(2). Appellant's complaint seeking recovery of \$1,500,000 did not invoke jurisdiction under the Tucker Act but specifically referred to 28 U.S.C. sec. 1346(b).

On December 7, 1941, the plaintiff's airport was closed by order of the United States Government. Said airport was used by the Government. After the other airports were opened in 1943, plaintiff's airport was kept closed. After the West Coast Defense Command approved the opening of plaintiff's airport, an order came through from Washington to keep plaintiff's field closed. Plaintiff succeeded through drastic action in the opening of her airport in October, 1945. However the Air Corps and later the Air Force used every means to hamper the plaintiff's business and have succeeded in keeping her business from attaining a fraction of its natural growth and used drastic and illegal means so to do. Continuously without cessation the Air Force and/or their agents have harassed the plaintiff and have tried and have ultimately succeeded in gaining illegal control of her property and have violated her Constitutional rights under the V Amendment. There has been a continuous tort committed against the plaintiff resulting in a partial taking or inverse condemnation of plaintiff's property and damage to her business. This complaint is not to be confused with the actual and illegal condemnation suit filed by the government but is for damages in addition to any damages arising from said condemnation suit and the price of the property involved should the plaintiff consent to eventually settle amicably with the United States Government on the condemnation suit and damages accrued therefrom.

The condemnation suit referred to by appellant was filed on February 27, 1953, to acquire the fee simple

title to her property in connection with the expansion of the Edwards Air Force Base, and a declaration of taking was filed on the same day. See *McKendry v. United States*, 219 F. 2d 357 (C.A. 9, 1955). Appellant's original complaint in this case was filed December 3, 1952 (R. 14), and her amended complaint was filed February 28, 1955 (R. 5).

The Government moved to dismiss the action on the grounds of lack of jurisdiction and failure to state a claim upon which relief could be granted (R. 5-7). The motion was noticed for hearing on April 4, 1955 (R. 5-6), but was reset for hearing on April 1, 1955, by the Honorable Leon R. Yankwich, Chief Judge, on his own motion (R. 7-8). On March 30, 1955, appellant filed an affidavit of bias and prejudice seeking the disqualification of Judge Yankwich (R. 8-11).

After hearing, appellant's oral motion for the disqualification of Judge Yankwich was denied, and her affidavit was ordered stricken as legally insufficient and scandalous (R. 11-12, 22-30). At the same time the court granted the Government's motion to dismiss the action on the ground that the complaint did not state a claim against the United States, and that, if it did state a claim for some kind of trespass, the acquisition of the property through condemnation put an end to the action (R. 39). An order dismissing the action was entered April 12, 1955 (R. 12-13), and this appeal followed (R. 13-15).

ARGUMENT

I

An Action Under the Federal Tort Claims Act Was Properly Dismissed When the Gravamen of the Action Was the Continuous Trepasses of Government Employees Amounting To a "Taking" and When a Proceeding To Condemn the Property Involved Was Subsequently Filed

As appellant confesses (Br. 6), her amended complaint "is indefinite in that it fails specifically to state the nature of the activities of the Government of which complaint is made and to state the period of time during which said activities took place." However, the amended complaint is not so indefinite that, with the aid of appellant's own interpretation of it, it does not clearly appear that the action was properly dismissed.

In the first place, it is abundantly clear that appellant's asserted cause of action is based in part upon the alleged closing of her airport and the use thereof by the Government during the period from the attack on Pearl Harbor in 1941 to 1945 (R. 3-4, 35-36; see Appellant's Br. 3). Obviously, this alleged wartime use of her airport by the Government was a completed transaction by 1945, so that by the time of the filing of her initial complaint on December 3, 1952, the usual six-year limitations period for commencing actions against the United States (28 U.S.C. sec. 2401(a)) had expired, to say nothing of the two-year limitations period for the filing of actions on tort claims (28 U.S.C. sec. 2401(b)). Hence, in this respect, at least, the action was properly dismissed. And the action as a whole was properly dismissed for reasons which will now appear.

Appellant's theory is that her complaint raises a

question of "continuous inverse condemnation,"² or a continuous taking of that property" (R. 37; see also R. 4, 35; Br. 3). She has further stated (R. 37), "'* * * it may have been an implied contract legally, but it certainly wasn't intended as such; it was intended simply as the taking of the property.'" Thus, we have in appellant's own words the admission that the dismissed action³ was one for the "taking" of property, and as further support for this reasoning we have her present reliance (Br. 7-8) upon the Tucker Act, 28 U.S.C. sec. 1346(a)(2), which was not invoked in her amended complaint. See, *supra*, p. 1, fn. 1. However, neither the Tucker Act, nor the Tort Claims Act (28 U.S.C. sec. 1345(b)), which was invoked by appellant (R. 3), affords any basis for appellant's action.

It cannot at this date be denied, and appellant recognizes (Br. 8), that the Government may "take" property in the exercise of the power of eminent domain without formal condemnation proceedings, and that in such event the landowner's remedy is a suit under the Tucker Act on the theory of implied contract, the recovery being the same as though a condemnation pro-

² In *State of California v. United States District Court*, 213 F.2d 818, 821, fn. 10 (1954), this Court has defined "inverse condemnation" as follows:

The term "inverse or reverse condemnation" contemplates the situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made.

³ It should be noted that at the time this action was pending in the district court, another tort claims action by appellant (No. 1146) was also pending, and the Government's motions to dismiss both actions were heard at the same time (R. 30). In No. 1146 the Government's motion to dismiss was granted as to one count and denied as to another (R. 32-35, 40). No. 1146 is still pending in the district court.

ceeding had been filed. *Campbell v. United States*, 266 U. S. 368, 370-371 (1924); *Hurley v. Kincaid*, 285 U. S. 95, 103-105 (1932); *Yearsley v. Ross Constr. Co.*, 309 U. S. 18, 21-23 (1940); *Causby v. United States*, 328 U. S. 256, 267 (1946). However, the Tucker Act is of no assistance to appellant here, not only because she did not invoke it in her complaint, but also because the jurisdiction of the district court in such cases is limited to claims not exceeding \$10,000 (28 U.S.C. sec. 1346(a)(2)), whereas her claim is in the amount of \$1,-500,000 (R. 5).

Appellant's reliance upon the Federal Tort Claims Act is also unavailing. If there were a lawful taking prior to the filing of the condemnation action, the acts of the government agents could not be "wrongful," so that there could be no basis for an action in tort. If, on the other hand, the acts of the Government's agents, relied upon by appellant as constituting an attempted taking, were in fact unauthorized and therefore tortious in the beginning, they have been subsequently ratified and adopted as governmental acts by the filing of the condemnation proceeding and even prior thereto by the Acts of Congress authorizing the taking.⁴ *Shoshone Tribe v. United States*, 299 U. S. 476, 495-496 (1937);

⁴ The Act of August 12, 1935, 49 Stat. 610, as amended by the Act of July 26, 1947, 61 Stat. 495, 500, 503, 10 U.S.C. secs. 1343(a), 1343(b) and 1343(c), authorizes the Secretary of the Air Force to acquire lands for the enlargement or alteration of existing air bases, as well as for the establishment of new bases. The Acts of June 17, 1950, 64 Stat. 236, 242, 244, and September 6, 1950, 64 Stat. 595, 748, appropriated moneys and authorized the acquisition of land for the expansion of the base here involved. See also the Act of September 28, 1951, 65 Stat. 336, 339, 361; Act of August 7, 1953, 67 Stat. 440, 449; Act of July 27, 1954, 68 Stat. 535, 557; Act of July 15, 1955, 69 Stat. 324, 342.

Crozier v. Krupp, 224 U. S. 290, 305 (1912). As stated in the *Crozier* case:

The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided.

Hence, it is submitted that even if the acts of government agents complained of by appellant were originally tortious by reason of being unauthorized, they will no longer support a suit under the Federal Tort Claims Act. Appellant may obtain all the relief to which she is entitled in the pending condemnation proceeding. For there was only one taking, whether that took place prior to the filing of the condemnation action or as a result thereof. There were not two takings, as appellant conceives the situation (R. 39), "once over a period of years in small parts, and eventually altogether at a different price." Cf. *United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945). And the date of taking is subject to determination in the condemnation proceeding and will determine the date of valuation and other rights. *Shoshone Tribe v. United States*, 299 U. S. 476, 494-497 (1937); *United States v. Rogers*, 255 U.S. 163, 167-169 (1921), where the "taking" was in 1912 and the condemnation proceeding was not brought until 1915; *Bank of Edenton v. United States*, 152 F. 2d 251, 253-254 (C.A. 4, 1945); *11,000 Acres of Land, etc. v. United States*, 152 F. 2d 566, 568 (C.A. 5, 1945), certiorari denied, 328 U.S. 835; cf. *United States v. Lynah*, 188 U.S. 445, 470 (1903); *Woodville v. United*

States, 152 F. 2d 735, 738 (C.A. 10, 1946), certiorari denied, 328 U.S. 842.

Moreover, in view of the statutory authority to acquire lands for the enlargement of the Edwards Air Force Base (see fn. 4, p. 7, *supra*), it would appear that jurisdiction to adjudicate claims based upon the alleged tortious conduct of government employees in attempting to gain control of appellant's land was barred by the exceptions in 28 U.S.C. sec. 2680(a).⁵ No negligence is alleged, so that, in addition to the "discretionary function" exception, the exception of claims based on the execution of a statute would be applicable. *Dalehite v. United States*, 346 U.S. 15, 24-36 (1953); *Coates v. United States*, 181 F. 2d 816 (C.A. 8, 1950). As the Court said in the *Dalehite* case (346 U.S. at p. 33) with respect to that exception:

The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars test by tort action of the legality of statutes and regulations.

And as stated in the House Report, quoted in the *Dalehite* case (346 U.S. at pp. 29-30), the exception precludes "any possibility that the bill might be construed to authorize suits for damages against the Gov-

⁵ Section 2680(a) provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or any employee of the Government, whether or not the discretion involved be abused.

ernment growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious."

II

The Refusal of the Trial Judge To Disqualify Himself Did Not Constitute Prejudicial Error

Defending the judicial impartiality of Judge Yankwich in this Court would, in our opinion, be tantamount to "carrying coals to Newcastle." Hence, the Government's argument under this point will be limited to the following:

First, the facts related in appellant's affidavit (R. 9-10), particularly the refusal of Judge Yankwich to speak to appellant in chambers, do not in any sense establish personal bias against her. *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913); *Price v. Johnston*, 125 F. 2d 806, 811-812 (C.A. 9, 1942), certiorari denied, 316 U.S. 677; *Beecher v. Federal Land Bank*, 153 F. 2d 987, 988 (C.A. 9, 1945), certiorari denied, 328 U.S. 871; *Ferrari v. United States*, 169 F. 2d 353, 354-355 (C.A. 9, 1948); *Lowe's, Inc. v. Cole*, 185 F. 2d 641, 646 (C.A. 9, 1950), certiorari denied, 340 U.S. 954; *Tucker v. Kerner*, 186 F. 2d 79, 83-84 (C.A. 7, 1950).

Secondly, appellant's affidavit was a nullity and entitled to no consideration since it was not, as required by the statute (28 U.S.C. sec. 144), "accompanied by a certificate of counsel of record stating that it is made in good faith." *Morse v. Lewis*, 54 F. 2d 1027, 1032 (C.A. 4, 1932), certiorari denied, 286 U.S. 557; *Beland*

v. *United States*, 117 F. 2d 958, 960 (C.A. 5, 1941), certiorari denied, 313 U.S. 585; *Mitchell v. United States*, 126 F. 2d 550, 552 (C.A. 10, 1942), certiorari denied, 316 U.S. 702, rehearing denied, 324 U.S. 887; *United States v. Onan*, 190 F. 2d 1, 6-7 (C.A. 8, 1951), certiorari denied, 342 U.S. 869.

Finally, even if it could possibly be held that the district court erred in refusing to disqualify himself, this could not lead to a reversal of the judgment, since, as we have shown (*supra*, pp. 5-10), the action was in any event properly dismissed. 28 U.S.C. sec. 2111; Rule 61, F.R.C.P.

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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JUNE, 1956.

No. 14908.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PANCHO BARNES, also known as FLORENCE LOWE BARNES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal From the United States District Court for the
Southern District of California, Northern Division.

APPELLANT'S REPLY BRIEF.

PANCHO BARNES,
Box 37,
Cantil, California,
Appellant In Propia Persona.

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Southern District of California, Northern Division.

APPELLANT'S REPLY BRIEF.

I.

A Cause of Action for Trespass Under the Federal
Tort Claims Act Is Not Barred by the Subsequent
Filing of a Condemnation Action by the Govern-
ment.

The Government's position is that a landowner's cause of action for trespass under the Federal Tort Claims Act is automatically terminated by the subsequent filing of a condemnation action by Government. The rationale is that the tortious act is ratified by the institution of the condemnation proceeding, and, by ratification, the tort is necessarily converted into a lawful taking *ab initio*. No authority cited by the Government supports so broad a rule.

The difficulty is that not every trespass or every series of trespasses by Government agents constitute a "taking" in the constitutional sense.

Whether the invasion of the landowner's proprietary interests constitutes a "taking" depends upon a number of factors, including the character and duration of the invasions, the nature and extent of the actor's authority, and the intention with which the act or acts were done. Whether, under all the circumstances of a particular case, the conduct constitutes a trespass or a series of trespasses or a taking in the constitutional sense frequently presents nice questions of fact and law. (*See, for example*, the discussion of this issue by Mr. Justice Holmes, speaking for the majority of the Court, in *Portsmouth v. Harbor Land & Hotel Co. v. United States*, 260 U. S. 327, 43 S. Ct. 135, 67 L. Ed. 287 (1922), and the dissent of Mr. Justice Brandeis.)

If the tortious act does not amount to a taking, the landowner is not permitted to treat it as a taking and demand compensation under eminent domain proceedings. He is remitted to an action for the tort under the Federal Tort Claims Act.

There is no suggestion in the authorities that a trespass, not constituting a taking, becomes compensable as if it were a taking by reason of the filing of condemnation proceedings by the Government at some later date.

The point may be illustrated by a hypothetical case. Suppose that an agent of the Government trespasses upon X's land to hunt dove. One year later, the Government institutes condemnation proceedings in respect of the property upon which the trespass was made. Could it be successfully contended by X that the trespass had been there-

by converted into a taking which was compensable in the condemnation action? Or if *X* had filed suit under the Federal Tort Claims Act for damages for the trespass, could the Government successfully contend that the action was barred by the institution of the condemnation suit? Is the result any different if the Government condemned the land to turn it into a Federal game preserve? Or is the result any different if the Government condemned the land to establish a recreational area including a hunting club for military personnel?

The authorities relied upon by the Government, *Shoshone Tribe v. United States*, 299 U. S. 476 (1937), and *Crozier v. Krupp*, 224 U. S. 290 (1912) are clearly distinguishable from the case at bar. Both cases were concerned with an actual appropriation of property by an officer of the Government for the benefit of the Government; the officer at the time of the taking did not have statutory authority for his actions. Subsequent legislation authorized reparation to the property owners for the very acts done by the officers. No eminent domain proceedings were instituted at any time in either case. Since both actions were tried before the adoption of the Federal Tort Claims Act, the only theory available upon which to fasten compensation was a prior taking in the constitutional sense.

That there was no question in the *Shoshone* case of subsequent condemnation is apparent from the Court's statement, speaking through Mr. Justice Cardozo, at page 492:

“ . . . The reports of the Committees of Congress preceding the two bills. . . make it plain that the purpose was to give reparation to the claim-

ant for an 'alleged unlawful appropriation' effected in the past, not to make a new and lawful appropriation by an exercise of sovereign power . . ."

In the *Crozier* case, the question principally involved was whether the plaintiff could obtain an injunction to prevent continued infringement of its patents by an officer of the Government who was using the patented articles for the benefit of the Government; in reaching its decision on this point, however, the Court discussed the effect of a subsequently enacted statute giving the officer authority to take such patents and authorizing the payment of compensation to the patentee for the taking.

None of the cases cited by the Government support the principle that an action for trespass is barred by the adoption of a statute authorizing the taking of the property or by the institution of condemnation proceedings following the adoption of such a statute.

The conclusion seems inescapable that if, in the case at bar, the acts of which complaint is made did not constitute a "taking" but did constitute a trespass or series of trespasses, the institution of condemnation proceedings could not turn the prior acts into a taking. If this be true, there is no reason to hold that a trespass action is abated or barred by the filing of a subsequent condemnation action by the Government.

II.

The Existence of Statutory Authority to Take Property Upon Which Trespasses Have Been Committed Does Not Convert the Trespasses Into a Taking.

The Government also argues that statutes were in existence by virtue of which condemnation proceedings could have been instituted at an earlier date by the Government, and, therefore, the acts of Government personnel upon the premises of the appellant necessarily constituted a taking authorized by statute.

The argument is not sound because (a) it assumes that the acts were done pursuant to the terms of the statutes cited, (b) it assumes that the acts done constituted a "taking," and (c) it assumes that the acts done were either non-negligent or, if negligent, were discretionary. These assumptions are unwarranted because the facts pleaded in the complaint do not support them; if such facts do exist, they may be appropriately pleaded by way of answer, or, the Government may seek clarification of the Complaint by a motion for a More Definite Statement.

The existence of a statute under which condemnation proceedings could be instituted does not convert every trespass into an exercise of eminent domain under authority of statute.

Carried to its extreme, the argument of the Government would mean that any time a statute permitting the condemnation of land were adopted, any Government em-

ployee or official could trespass upon the subject land at any time with immunity.

Even when the Government has instituted formal condemnation proceedings, the taking is subject to challenge by the landowner on the ground, among others, that the taking was unauthorized by statute, that the officials instituting the action did not act pursuant to the statutory mandate, but acted arbitrarily and in bad faith. (*E. g.*, *United States v. Carmack*, 239 U. S. 230; *United States v. Oakland*, 124 F. 2d 959 (9th Cir.), *cert. denied* 316 U. S. 679; *C. M. Patten & Co. v. United States*, 61 F. 2d 970 (9th Cir.); *cf. Catlin v. United States*, 324 U. S. 229.)

III.

There May Be Successive Takings Under Exercise of the Power of Eminent Domain: The Landowner Is Entitled to Just Compensation For What Is Taken Each Time.

We have previously seen that if the acts complained of constituted simply trespasses and not a taking in the constitutional sense, we are dealing with a tort under the Federal Tort Claims Act. On the other hand, if the acts constituted an implied taking, liability of the Government, if any, is not founded on that Act, but upon the Tucker Act and upon the requirement of just compensation insured the landowner by the Fifth Amendment of the Federal Constitution.

The Government has argued (Resp. Br. p. 8) that there can be only one taking of the subject property. It suggests that it is not possible to have successive takings of property in exercise of eminent domain. This argument is sound if, but only if, the Government is talking about the taking of the same interests in the same property from

the same persons successively. Of course, the Government may take a fee simple absolute either by inverse or formal condemnation proceedings. But it may take any lesser interest. If it takes an interest in property less than a fee simple, it may thereafter decide to acquire the fee. The Government must pay for what it takes each time it acquires a further interest in the property. (See, *e. g.*, 18 *Am. Jur.*, "Eminent Domain," Sec. 88, p. 716.) The principle is clearly recognized by the Supreme Court in *United States v. General Motors Corp.*, 323 U. S. 373, at 382 (1944), a case concerning a temporary and partial taking. It cannot be doubted that if the Government subsequently took the entire fee interest in the *General Motors* case, it would not be relieved from paying for the interest which it had previously acquired or from paying for the greater interest subsequently acquired. Under such circumstances there is more than one cause of action: one is not a bar to the other.

It is even possible for the Government to take the fee interest twice, if between takings, the Government has conveyed the property to a third person: under such circumstances, the Government must pay compensation upon re-taking the property. (*West Virginia Pulp & Paper Co. v. United States*, 109 Fed. Supp. 724 (Ct. Cl. 1953).

Appellant submits that the Complaint clearly indicates that if the actions of the Government agents constituted a taking, it was a partial taking only which did not constitute and could not constitute a taking of the fee. That the Government later instituted proceedings to take the fee should not preclude compensation for that portion of the property which was previously taken.

IV.

Appellant's Affidavit Was Supported by a Proper Certificate.

Appellant's affidavit contained a certificate supporting the Affidavit in the following terms:

"I hereby certify that I am appearing in propria persona in the above-entitled case, and that the above affidavit is made in good faith." [Tr. p. 11.]

In the case of a party appearing *in propria persona* such a statement must be sufficient compliance with the statute.

If the Government's argument be accepted, that this statement is not sufficient to constitute "a certificate of counsel of record stating that it is made in good faith," one appearing *in propria persona* is foreclosed from ever filing an affidavit of bias and prejudice. Such an interpretation is subject to serious constitutional doubt. To avoid such doubt, it should be held that a party appearing *in propria persona* is his own counsel of record for the purpose of Section 144 of Title 28, United States Code.

For the foregoing reasons, Appellant respectfully urges that the Judgment and Order of the District Court dismissing her amended complaint be reversed.

Respectfully submitted,

PANCHO BARNES,

Appellant In Propria Persona.

